

# THE LAW OF ADMINISTRATIVE TRIBUNALS

A Collection of  
Judicial Decisions, Statutes, Administrative  
Rules and Orders and Other Materials

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## Preface to First Edition

Administrative law during the last half century, and particularly during the post-war years, has made for itself an important niche in American jurisprudence—and the niche is still growing. The Congress and the state legislatures are continuously placing a larger and larger fraction of the functions of government into the hands of administrative agencies. Moreover, in apparent defiance of the mandates springing from the constitutional doctrine of separation of powers, such agencies have been made repositories, not only of conventional ministerial and administrative powers, but also of powers in their essential nature either judicial or legislative, or both. Yet these agencies seem to be an essential part of the modern social and economic order. In a governmental structure which of necessity devotes an increasing amount of effort and energy to the regulation of complex private business and to the management of diverse public affairs, it is to be expected that we shall give birth to more and more such agencies.

Instrumentalities so constituted and implemented give rise to new and unusual constitutional and legal problems. Furthermore, the fact that they are empowered to exercise two or even all three of the governmental powers in a limited area of action gives rise to new and unusual functional, procedural and practical problems in the administration of government. It has been said that when such agencies exercise all three of the conventional powers of government, they really constitute independent miniature governments within their limited functional areas. So they do, although that fact is not necessarily a condemnation. Municipal corporations have long been accepted as miniature governments within their respective geographical areas, and the creation of new municipalities is hailed as home rule, not shunned as bureaucracy. In any event, around the present day administrative mechanism is growing a vast body of constitutional, legal, procedural, functional and practical doctrine of no mean importance in the current practice of law and study of government. To provide the materials for the exploration of these doctrines this book is primarily designed.

In selecting the materials to be included it has been deemed desirable, of course, to consider the basic constitutional and legal problems connected with the delegation of powers to administrative authorities and the judicial control of administrative action. However, it has also seemed desirable, and indeed essential, to direct attention in substantial measure to the working of administrative mechanism itself.

To the latter end materials are marshalled on such matters as the practical utility of the administrative tribunal as an agency for accomplishing contemporary objectives of the police power, the procedural details of the day to day working of the administrative organism, the relationship between constitutional limitations and the functional efficiency of administrative tribunals, etc. In short, the intention is to lay before the students not only the legal controls over administrative agencies, but also the actual operation of the mechanism itself.

A wide variety of materials is utilized in the collection. Because the administrative tribunal is primarily a child of statute law, it has been deemed desirable to set forth at a considerable length excerpts from the parent statutes—this in spite of the fact that such statutes are usually regarded as rather dull reading. Because the tribunal is in part at least a rule-making body, and since its rules constitute an important part of administrative law, it has seemed necessary to set forth certain examples of administrative rules and regulations. Because the tribunal acts in a judicial capacity and renders decisions much after the style of court decisions, certain administrative decisions are set forth. Because much of the law of administrative tribunals is developed in the courts of the land, relevant judicial decisions necessarily form an important part of the collection. Quotations from law reviews and treatises, excerpts from committee reports, and occasionally passages of text prepared by the author, are all used to bring forth phases of the subject which have seemed to lend themselves appropriately to these forms of treatment. In so new and dynamic a field the materials are necessarily not yet crystallized, and the widest conceivable variety is available. No two persons will agree as to what should be included. This very fact adds interest to the subject matter.

A word as to comparative materials. Administrative law and administrative legislation and adjudication are not confined to this country. Administrative adjudication has long been known on the continent of Europe. To an increasing extent in recent years it has come into prominence in England and among the English Dominions. Delegated legislative power has become so extensive in Great Britain that it has caused serious apprehension among many leading British jurists. Much which will be of interest and use to us in the United States can, of course, be learned from foreign countries. Advantage should therefore be taken of foreign experience so far as it is illuminating. However, since the development of administrative law in this country is so largely affected by written constitutions, the aid which we can derive from foreign experience is limited to the broader outlines of the subject. The specific details are decidedly localized in significance. With this in mind foreign experience has been brought forward primarily in connection with the broader aspects of the subject matter. No at-

tempt has been made to illuminate the minutiae by reference to practice abroad.

Certain matters of a rather mechanical nature call for mention. In the first place, it is obviously not possible within the limits of time available for the usual law school course in administrative law to cover all phases of the subject in any substantial manner. In selecting the portions of the subject to be treated I have been guided by several considerations. The significance of the subject matter in present day law practice, the significance of it with respect to the current development of American governmental institutions, and the relation of it to other courses in the law curriculum have all been given weight. Possibly other persons would place the emphasis on different phases of the subject matter. I have tried to be guided, however, by considerations both of practical value, jurisprudential soundness, and integration with other law school courses.

The footnotes have been used for four distinct purposes: First, to throw additional light on the problems raised by the text; second, to furnish necessary information and citations concerning portions of the law which are of importance but which are either covered elsewhere in the curriculum or which because of time limits must be relegated to the background; third, to further define the many shadowy boundary lines in the law which can only be defined by an examination of numerous cases; and, fourth, to provide references and encourage excursions into the wealth of material not only in law reviews and in legal treatises, but also in economic and political writings. As to the passages of text prepared by myself, my only explanation of them is the fact that I have hoped that they would serve to illuminate portions of the field which for one reason or another cannot be adequately covered within the limitations of time and space in any more satisfactory way.

E. BLYTHE STASON

Ann Arbor, Michigan  
May 1, 1937

## Preface to Second Edition

Knowledge of administrative law has grown steadily since the publication of the first edition of this casebook nearly ten years ago. Supreme Court decisions have clarified the guiding constitutional principles. Legislation has embraced many areas demanding special attention. This second edition endeavors to take account of the developments of the last decade. The material contained in the first four chapters has been completely reorganized. In the other chapters necessary changes have been made to take advantage of new decisions and statutes and to introduce improvements in the arrangement indicated by classroom use of the first edition. Much obsolete material has been eliminated.

Some teachers of administrative law will question the wisdom of including so much text and statutory material at the beginning of the casebook. For classroom purposes, such material is somewhat less satisfactory than judicial decisions which can be so readily analyzed and discussed in accordance with the conventional case method. However, many years of teaching administrative law have led me to the conviction that the study of the subject from cases alone lacks completeness and reality. I prefer to insist upon students undertaking, at the outset, a careful examination of the statutory foundation upon which administrative law rests. That is my reason for including the Communications Act of 1934, the new Federal Administrative Procedure Act, and the text material dealing with these and other statutory developments.

E. BLYTHE STASON

Ann Arbor, Michigan  
December 26, 1946

## Preface to Third Edition

When the second edition was published in December, 1946, the enactment of the Federal Administrative Procedure Act was still headline news. What effect the gloss of judicial interpretation would have on its seemingly plain and forthright mandates could not then be foretold.

There has now been a decade of experience under the Administrative Procedure Act. This experience has, we think, demonstrated the fundamental soundness of the Act, and at the same time it has revealed that some defects exist—or, at least, that some problems still remain unsolved. The report of the Hoover Commission Task Force on Legal Services and Procedure, published in 1955, points out these problems and makes certain intriguing suggestions for their solution.

It is in this area—the implementation of the Administrative Procedure Act to meet the needs pointed out by the Hoover Commission Task Force—that the administrative law of the next decade will develop. Accordingly, it is to this area that this book is primarily directed.

In carrying out this general purpose, there have been included the leading cases of the last decade and also frequent references to the report of the Hoover Commission Task Force.

This has necessitated condensation of some of the material in the earlier editions—particularly in the chapters dealing with delegation of power and methods of review. Much of the condensation has been accomplished by the use of textual notes to provide background material. Such notes have also been used in other chapters, to provide a basis for class discussion of problems thought worthy of group argument.

There has also been some rearrangement of the material on hearing procedures (the taking of evidence, the process of institutional decision, and the substantial evidence problem) to meet needs suggested by classroom experience.

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Ann Arbor, Michigan  
December 20, 1956

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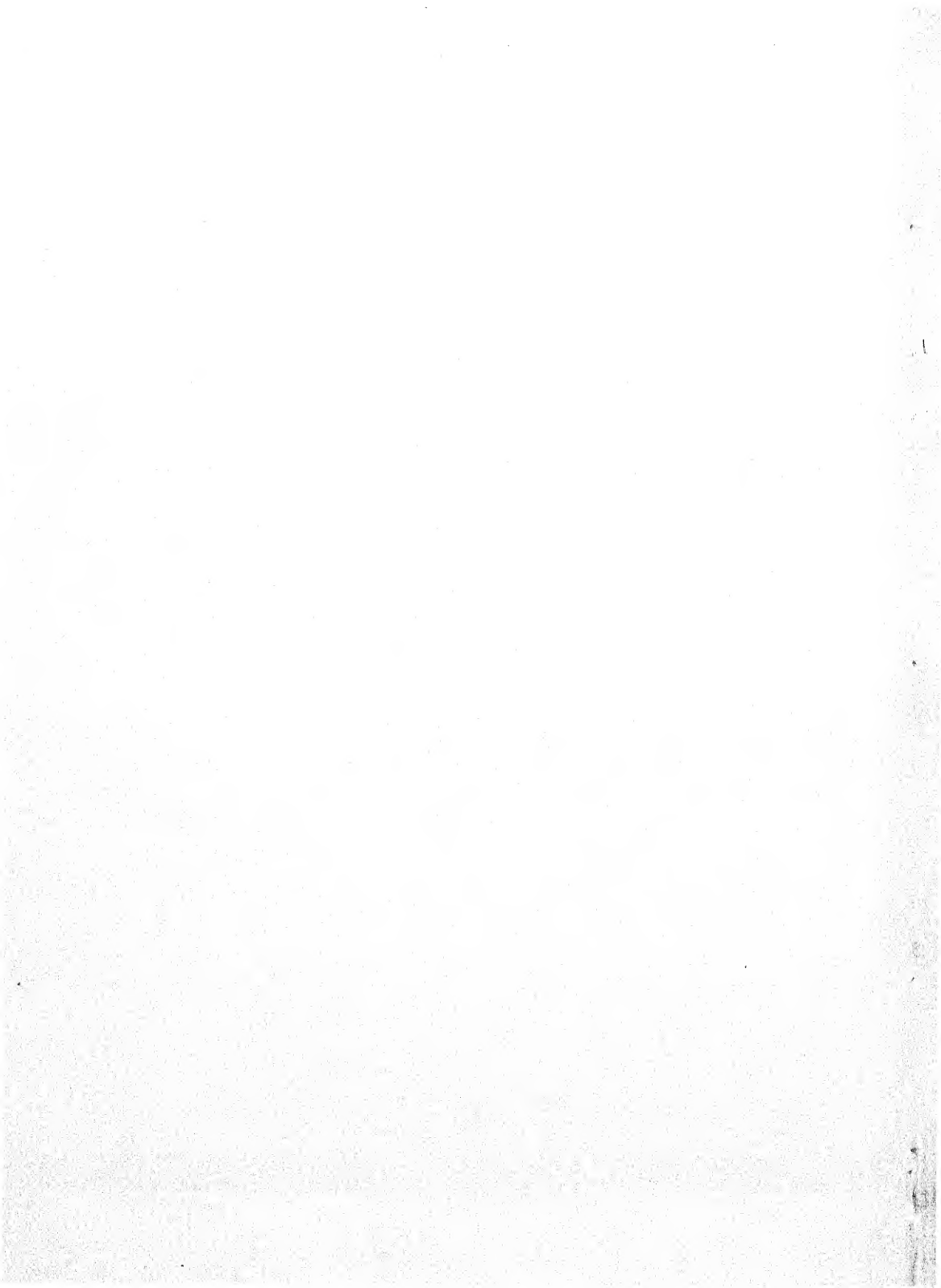
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# **PART I**

## **CREATION OF ADMINISTRATIVE TRIBUNALS AND THEIR FUNCTIONS**

### **CHAPTER I**

#### **ESTABLISHMENT OF ADMINISTRATIVE TRIBUNALS**

##### **SECTION 1. SCOPE OF ADMINISTRATIVE LAW**

In its broadest sense the term "administrative law" includes all of that portion of the public law of the land concerning executive and administrative officials. In this sense it includes much of the law of sovereign states, their powers and duties, the law of public officers, their election, appointment and removal, civil service, and the rights, duties and liabilities of officers, much of the law of public corporations, the law relating to governmental services and the distribution of the bounties of government, and, finally, all of that great and growing mass of legal doctrine having to do with the enforcement of statute law regulating private affairs. It necessarily includes also the procedural methods by which the substantive law in these fields is effectuated. In this sense the range of the subject is very wide, and the legal materials comprehended within it are of enormous volume. Much of it is now treated in regular law school courses on Constitutional Law, Municipal Corporations, Public Officers, Taxation, Legislation and Public Utilities.<sup>1</sup>

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<sup>1</sup> "American administrative law has not crystallized; it is not even clear that the confines of administrative law, as distinguished from constitutional law, for example, have been clearly established. One of the unquestioned difficulties of the past has been the failure to consider the entire ambit of administrative law. The time has come when some form of general agreement should be reached concerning the extent and limits of the administrative law field. Of course it is only natural that the several commentators on any substantive body of law should emphasize some aspects which are their individual specialties, to the comparative neglect of others. . . . So long as this incompleteness exists among the principal authorities on administrative law, it stands to reason that critics might scoff at its unimpressiveness as a science, and state that it has no legitimate claim to separate existence. . . .

"But the warning is opportune. Administrative law should be clearly defined, at the same time recognizing the desirability of close synthesis with constitu-

For the purpose of the study projected by this collection of materials a narrower range is selected—one which is dictated partly by considerations of available classroom time, partly by the fact that the other courses mentioned cover a portion of the field, and partly by the paramount importance of certain segments of the field in present day practice of law and in current public administration.

Attention will be focused primarily on the limitations which the courts impose on the exercise of administrative discretion. These limitations are derived chiefly from the doctrine of separation of powers (a doctrine borrowed from eighteenth century political philosophy<sup>2</sup> and made an integral part of American constitutional law) and from the vague contours of the due process clause of the Fourteenth Amendment.

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tional law, public administration and related fields. A definition which will approximate the current idea concerning the bounds of administrative law may be suggested. American administrative law is that body of public law which relates to the organization of the administration; its legal relation to other departments and powers of the government; the rights and duties of holding office; and the nature and extent of the powers, regulations and methods by which the objectives of government are carried out administratively. The second part of the subject deals with the liability of the officer and of the government for illegal acts which injure the citizen; and the remedies, judicial and administrative, which the government provides in order to assure relief." Dimock, M. E., "The Development of American Administrative Law," 15 Jour. Comp. Leg. & Int. L. (3d Series) 35, 43 (1933).

<sup>2</sup> "In every government there are three sorts of power; the legislative; the executive in respect to things dependent on the law of nations; and the executive in regard to matters that depend on the civil law.

"By virtue of the first, the prince or magistrate enacts temporary or perpetual laws, and amends or abrogates those that have been already enacted. By the second, he makes peace or war, sends or receives embassies, establishes the public security, and provides against invasions. By the third he punishes criminals, or determines the disputes that arise between individuals. The latter we shall call the judiciary power and the other simply the executive power of the state.

"When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.

"Again, there is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would then be the legislator. Were it joined to the executive power, the judge might behave with violence and oppression.

"There would be an end to everything, were the same man or the same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals." Montesquieu, "The Spirit of the Laws" (Nugent's Transl.) 1900, Bk. XI, Ch. 6.

Montesquieu got his ideas from Locke's essays. Locke had taken them from Aristotle.

More specifically, an examination will be made of the operation of these court-imposed limitations in three fields: first, the delegation of legislative and judicial powers to administrative agencies; second, the processes of agency adjudication and rule-making (including the securing of information, hearing procedures and methods of decision-making); third, judicial review.

In addition, consideration will be given (in connection with each of these three general topics) to suggestions for legislation designed to improve the effectiveness and fairness of the administrative process.

At the outset of the projected study, it is important to understand the vital influence which the doctrine of separation of powers has had on the development of administrative law in the United States. Under the influence of this doctrine we have built our governments, both national and state, each with three major political divisions—the legislature, the judiciary and the executive. Furthermore, we have been taught that the doctrine of separation of powers not only requires the distribution of the powers of government among these three branches, but also that it prohibits the officials in any one branch from exercising any of the functions of the other two branches. In fact many of our state constitutions expressly so provide.<sup>3</sup> The Federal Constitution and others of the state constitutions do not contain express prohibitions of this sort, but the same result is achieved by implication.

In modern American administrative law we find a development that gives the appearance of cutting across this tripartite scheme of government. Many administrative organs, particularly those which are created to regulate private interests, seem to exercise, in addition to administra-

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<sup>3</sup> For example, see Mich. Const. (1908), Art. IV reading as follows:

"Section 1. The powers of government are divided into three departments; the legislative, executive and judicial.

"Section 2. No person belonging to one department shall exercise the powers properly belonging to another, except in cases expressly provided in this constitution."

In Massachusetts a somewhat different and perhaps more picturesque phraseology is employed. Part I, Section XXX of the Massachusetts constitution reads as follows:

"In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers or either of them: The executive shall never exercise the legislative and judicial powers, or either of them: The judicial shall never exercise the legislative and executive powers, or either of them: to the end that it may be a government of laws and not of men."

Not all state constitutions contain express language like that above quoted, but in such states substantially the same result is reached by implication. Such express language is found, however, in the constitutions of Alabama, Arizona, Arkansas, California, Colorado, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Jersey, New Mexico, Oklahoma, Oregon, South Carolina, Tennessee, Texas, Utah, Vermont, Virginia, West Virginia, and Wyoming.

tive powers, powers normally exercised or properly exercisable by either the legislature or the judiciary, or both. For example, the Interstate Commerce Commission, when it promulgates rules concerning the assignment of coal cars to the mines in times of shortage, is engaged in rule making and is in reality exercising a legislative function. But when it enters an order commanding a carrier to pay "reparations" to a shipper who has been subjected to excessive freight charges, it is acting much after the fashion of a court under similar circumstances. And when it is engaged in the valuation of a railway company's physical properties, not in connection with specific rate proceedings, but to have on hand statistical information for future use, it is acting administratively. All of these powers are exercised by a single governmental organ in apparent contravention of the doctrines of separation and distribution of powers. Yet such a union of powers is sanctioned under our constitutions primarily because the complexities of modern governmental procedures demand it. The doctrine of separation of powers gives ground in the face of governmental necessity.

In order to camouflage this invasion of constitutional limitations some courts have been inclined to call "quasi-legislative" the legislative functions exercised by administrative tribunals, and to call "quasi-judicial" the judicial functions so exercised. Nothing is gained, however, by such circumlocution. It is much more satisfactory to recognize, as does the United States Supreme Court, that certain administrative organs, because of the necessities of the case, have become the repositories of powers which have all the earmarks of legislative and judicial powers, and that this apparent anomaly in government must simply be charged to necessity.

For the want of a better term administrative organs which are implemented with grants of legislative power, or judicial power, or both of such powers, will be spoken of as administrative tribunals. Such tribunals present some unique problems in constitutional law. Furthermore, bearing the brunt as they do of the government's attack upon the problem of regulating private interests for the general welfare, such tribunals present many interesting and important functional, procedural and practical problems. And finally they are a part and parcel of sweeping changes in our system of administration of justice, comparable to and no less significant than the development of equity jurisprudence alongside the common law. These tribunals, and their jurisprudential, constitutional, functional, procedural and practical problems, constitute the main bulk of the study contemplated by this collection of materials. Occasional excursions into other phases of administrative law (such as the law of public officers) will be undertaken from time to time, partly for the sake of rounding out the study of the entire field as fully as possible within available time limits, and partly in the interest of throwing light upon the central theme. The range of materials thus chosen for study presents a compact outline

and covers materials not explored elsewhere in the curriculum. Yet they are of vast importance both to the practicing lawyer and to those engaged or interested in public administration. These considerations stand as the justification for restricting the scope of this study primarily to that portion of administrative law having to do with administrative tribunals.

## **SECTION 2. THE STATUTORY ORIGIN OF ADMINISTRATIVE TRIBUNALS AND THEIR POWERS**

In this country administrative tribunals are statutory creations and their rights, duties, powers and privileges are of statutory derivation. There is no "common law" of administrative tribunals. However, not all of the law of administrative tribunals is found in the express language of statutes. Much of it is derived by implication and is arrived at by the process of interpretation of the express language of the statutes. Again, constitutional limitations play a prominent part in the formulation of the law surrounding the subject, and it frequently happens that the express terms of statutes must be restrictively construed to keep them within constitutional limits. In a word, then, we look for the rights, duties, powers and privileges of administrative tribunals in either the express language or the implications of statutes, all construed in the light of prevailing constitutional limitations. An adequate realization of this as the source of the law of the subject is an essential first step toward a proper understanding of it.<sup>4</sup>

An enumeration of the principal administrative tribunals in our national and state governments will convey a picture of the breadth of the scheme of administrative control as it now confronts us in the American governmental structure. The following enumeration of the federal tribunals is accompanied by citations of statutory sources. These will be of convenience in referring to the specific provisions concerning the several tribunals.

Atomic Energy Commission, Atomic Energy Act of 1954, Public Law 703, ch. 1073, Aug. 30, 1954; 42 USCA 2011.

Civil Aeronautics Authority, Civil Aeronautics Act of 1938, 49 USCA 401.

Federal Communications Commission, Communications Act of 1934, 47 USCA 151.

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<sup>4</sup> Administrative tribunals may be and sometimes are set up by executive order, but the order is promulgated pursuant to statute. In this way there have been created such agencies as the Federal Alcohol Administration, the Public Works Administration, the Federal Housing Administration, the Federal Emergency Relief Administration of the 1930's, and a number of temporary "emergency" agencies created during the period of World War II, such as the War Production Board, the Office of Price Administration and the National War Labor Board.

- Federal Deposit Insurance Corporation, Banking Act of 1933, as amended, 12 USCA 264.
- Federal Power Commission, Federal Power Act, 16 USCA 791a.
- Federal Power Commission, Natural Gas Act, 15 USCA 717.
- Federal Reserve System, Federal Reserve Act, 12 USCA 241.
- Federal Security Agency, Federal Food, Drug and Cosmetic Act, 21 USCA 301.
- Federal Security Agency, Social Security Act, 42 USCA 301.
- Federal Trade Commission, Federal Trade Commission Act, 15 USCA 41.
- Interstate Commerce Commission, Interstate Commerce Act, 49 USCA 1.
- Interstate Commerce Commission, Interstate Commerce Act, Part II (Motor Carrier Act of 1935), 49 USCA 301.
- National Labor Relations Board, National Labor Relations Act, 29 USCA 151.
- National Mediation Board, Railway Labor Act, 45 USCA 154.
- Postmaster General, Second Class Mailing Privileges, Fraud Orders, 39 USCA 224, 259.
- Railroad Retirement Board, Railroad Retirement Act of 1935, 45 USCA 215.
- Secretary of Agriculture, Commodity Exchange Act, 7 USCA 1.
- Secretary of Agriculture, Packers and Stockyards Act of 1921, 7 USCA 181.
- Secretary of Agriculture, Soil Conservation and Domestic Allotment Act, 16 USCA 590a.
- Secretary of Agriculture, United States Grain Standards Act, 7 USCA 71.
- Secretary of Commerce, Bureau of Marine Inspection and Navigation, 5 USCA 597.
- Secretary of Commerce, The Patent Office, 35 USCA 1.
- Secretary of the Interior, General Land Office, 43 USCA 1.
- Secretary of Labor, Fair Labor Standards Act of 1938, 29 USCA 201.
- Secretary of Labor, Public Contracts Act, 41 USCA 35.
- Secretary of the Treasury, Bureau of Narcotics, 5 USCA 282.
- Secretary of the Treasury, Commissioner of Internal Revenue, 26 USCA 3900.
- Secretary of the Treasury, Federal Alcohol Administration, 27 USCA 201.
- Secretary of War, Bridge Act and Other Acts Concerning Navigable Waters, 33 USCA 401, 491.
- Securities and Exchange Commission, Public Utility Holding Company Act of 1935, 15 USCA 79.
- Securities and Exchange Commission, Securities Exchange Act of 1934, 15 USCA 78a.



United States Employees Compensation Commission, Longshoremen's and Harbor Worker's Compensation Act, 33 USCA 901.

United States Maritime Commission, Merchant Marine Act of 1936, 46 USCA 1101.

United States Tariff Commission, Tariff Act of 1930, as amended, 19 USCA 1330.

Veterans Administration, 38 USCA 1.

Mention should also be made of certain specialized courts that have been set up in the federal system. They are not, of course, administrative tribunals, but they deal with administrative matters and certain of them entertain appeals from administrative authorities. They are:

United States Court of Claims, 28 USCA 241.

United States Court of Customs and Patent Appeals, 28 USCA 301.

United States Customs Court, 28 USCA 296.

United States Tax Court, 26 USCA 1100.

Not only in the national government but also in the various state and local governments do we find administrative tribunals, touching almost every phase of business and many phases of private life. They include:

Public Utilities Commissions.

Workmen's Compensation Commissions.

Boards of Equalization.

Tax Commissions.

Boards of Health.

Boards of Zoning Appeals.

Civil Service Commissions.

Unemployment Compensation Commissions.

Licensing Boards, Commissions and Agencies (of which there are a very great number, licensing everything from doctors and lawyers to chiropodists and prize fights).

It can be said without fear of exaggeration that national, state and local administrative agencies dominate, regulate or at least affect most of the economic and social functions of contemporary life.<sup>5</sup>

### **SECTION 3. PURPOSES SERVED BY ADMINISTRATIVE TRIBUNALS IN AMERICAN GOVERNMENT**

All informed persons are aware that the number of administrative tribunals in our governmental scheme is increasing by leaps and bounds. One is often urged to believe that the increase is due to a sort of unholy

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<sup>5</sup> *Government corporations.* During recent years the federal government made considerable use of the governmental corporation as a device in aid of administration. Among the most important of these corporations have been the Inland Waterways Corporation, the Reconstruction Finance Corporation, the Federal Deposit Insurance Corporation, the Home Owners Loan Corporation, and the Tennessee Valley Authority.

combination of malevolent "bureaucrats" who are desirous of increasing their own powers at the expense of democracy. While there may be some tendency on the part of officialdom to perpetuate and to aggrandize itself, the real reasons for the recent growth in the number and powers of administrative tribunals are much more fundamental in nature. The reasons may be summarized as follows:

(a) To an ever increasing extent the legislatures, both state and federal, find themselves lacking both in time and technique necessary to permit them to prescribe all of the detailed rules necessary for dealing with the complex and highly technical subjects of modern legislation. In such event the most feasible alternative is for the legislatures to formulate the general policies to be followed and to delegate to administrative tribunals, informed by training and experience in their several fields, the task of promulgating the detailed rules and regulations necessary to effectuate legislative policies. The Securities and Exchange Act of 1934 is an excellent illustration of the extent to which subordinate legislative powers are, and indeed must be, delegated. In almost every section of that act the power to make such rules and regulations as are necessary in the various situations is placed in the hands of the Commission.

(b) The development of social control of private affairs on a wide scale has required the formulation of rules of action in new fields of governmental activity where the precise rule of action to be enforced is not apparent and where careful experimentation is necessary. Hence a measure of flexibility is desirable. Discretion rather than rigid rule is the desideratum. The legislatures, meeting infrequently and subject to more or less cumbersome procedural methods, are ill adapted to carry on such a course of experimentation. The administrative tribunal with its informal methods is much better adapted. As we enter new fields of regulation where the operative rules which should be applied can be determined only by experimentation, we can expect to find still further use made of the administrative tribunal as the experimenting mechanism. Much of the work of the Federal Communications Commission is of necessity of this experimental character.

(c) From time to time we become conscious of the fact that judicial systems of the country are unsatisfactory mechanisms for the adjudication of certain types of controversies arising in the current social and economic order. Judicial procedure has proved too slow, too cumbersome, too costly, too inexpert in certain fact situations to satisfy modern needs. Under such circumstances we turn to administrative tribunals as more efficient law enforcement agencies. The workmen's compensation commissions are a manifestation of this cause of growth of administrative law. The Federal Trade Commission is to a certain extent in the same category.

(d) The judiciary, excellent though it is for the purpose of disposing of purely private controversies arising under either the common law or statute law, is not well adapted to dealing with controversies of social content in which general public welfare becomes a significant factor. The courts treat each case as an isolated set of operative facts involving primarily the parties to the proceedings. Cases are decided on the basis of the facts brought before the court by the parties. A court is not implemented to bring to bear upon a case at hand facts, figures and information relating to general public interests in the issues at bar. The administrative tribunal, on the other hand, can be and usually is given the distinct legislative mandate to bring the public interest to bear upon issues decided by it. It usually is given the power to proceed on its own motion to secure information, and to inform itself generally concerning its jurisdictional field. It can therefore bring to bear upon cases pending before it detailed information concerning the social and economic consequences of any action it may take. This functional difference between the administrative tribunal and the court becomes of great importance and value in certain fields of law enforcement. The functioning of the Federal Trade Commission in connection with the elimination of unfair methods of competition is illustrative of this phase of administrative power. Furthermore, administrative tribunals by virtue of the breadth of information which they acquire are exceptionally well adapted to provide the legislatures with information necessary to the further development of regulatory legislation. In short, the administrative tribunal fits into a system of regulation in the general public interest much more effectively than does the judiciary. It is an essential part of the modern regulatory machine.

(e) As our governments both state and national develop new services which they render for the public, and as they discover new needs for governmental bounties, administrative tribunals will make their appearance as agencies in aid of administration. The Social Security Board, the Railroad Retirement Board and the Veterans Administration are recent developments in the federal system illustrating this type of growth. In the state governments the unemployment insurance commissions and the various welfare boards provide additional illustrations.

As governmental power is, in the future, extended into one new field after another—and the tendency is inevitable—even more administrative tribunals may be expected to come into existence. As the management of public affairs requires more and more administrative attention to details, other new administrative tribunals may be expected to be created to handle them. So whether we feel that the growth of administrative tribunals represents a progressive development in gov-

ernment or, on the other hand, that it represents an unfortunate trend toward bureaucracy, we must recognize that they are in any event and to a large measure inevitable. We should direct our energies toward a proper understanding of the development and toward a proper adjustment of such tribunals, their personnel and their actions to our constitutional scheme of government and to the necessities of democratic public administration.<sup>6</sup>

It may be expected, as above noted, that administrative agencies will continue to grow, both in number and in stature. But it does not necessarily follow that the growth will continue along the lines which it has followed during the last two decades. Their development during the last twenty years has indicated the existence of certain practical limitations on their theoretical potentialities.<sup>7</sup> Attention must therefore be given both to their capacities and to their limitations, in arriving at a mature judgment as to their proper sphere in the governmental scheme.

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<sup>6</sup> The historical and legal background of administrative law, and the causes and nature of its growth in this country are well discussed in the following items: Pound, "Executive Justice," 46 Am. L. Reg. (N. S.) 137 (1907) ("Executive justice is an evil. It has always been and it always will be crude and as variable as the personalities of officials. . . . But any justice is better than no justice. The only way to check the onward march of executive justice is to improve the output of judicial justice"); Pound, "Administrative Law and the Courts," 24 Boston Univ. L. Rev. 201 (1944); Rosenberry, "Administrative Law and the Constitution," 23 Am. Pol. Sci. Rev. 33 (1929); Berle, "Expansion of American Administrative Law," 30 Harv. L. Rev. 430 (1917); and also a collection of papers by Ernst Freund and others entitled, "The Growth of American Administrative Law," (1923).

C. G. Haines, in an article entitled, "Effects of Growth of Administrative Law Upon Traditional Anglo-American Legal Theories and Practices," 26 Am. Pol. Sci. Rev. 875-894 (1932), discusses the influences motivating the growth of modern administrative law. Also one should read "The Report of the Committee on Ministers' Powers," 1932, pp. 51, 52, 92-97, for a statement of the Committee's findings as to the reasons for the increased delegation of quasi-legislative and quasi-judicial powers to administrative tribunals in England.

A good introductory article showing the relation of administrative agencies to our governmental scheme is Bevis, "Administrative Commissions and the Administration of Justice," 2 Univ. of Cinn. L. Rev. 1 (1928). Also to the same effect and elaborating upon the functions conferred upon federal tribunals, see the Reports of the Special Committee on Administrative Law of the American Bar Association, 58 A. B. A. Rep. 407-427 (1933); and 59 A. B. A. Rep. 539-564 (1934); 60 A. B. A. Rep. 136-143 (1935); 61 A. B. A. Rep. 720-796 (1936).

<sup>7</sup> Several aspects of this problem are considered in an article by Louis L. Jaffe, "The Effective Limits of the Administrative Process: A Re-evaluation," 67 Harv. L. Rev. 1105 (1954). With this article, there may be compared a penetrating review of historical developments by Bernard Schwartz, "A Decade of Administrative Law," 51 Mich. L. Rev. 775 (1953).

## SECTION 4. ORGANIZATION AND DUTIES OF ADMINISTRATIVE AGENCIES

Quoted from the Final Report of the Attorney General's Committee,  
Pages 18-20 <sup>8</sup>

Certain characteristics of administrative agencies are of such fundamental importance in relation to the problems of their organization and procedure as to require specially emphatic statement.

1. *Size.*—Most administrative agencies are, of necessity, large organizations. For example, the Interstate Commerce Commission has a personnel of more than 1800; the Securities and Exchange Commission, more than 725; the National Labor Relations Board, more than 1200; the Federal Power Commission, more than 600; the Federal Communications Commission, more than 1100; the Railroad Retirement Board, more than 2100; the Veterans' Administration, more than 180,000, of whom nearly 2000 are engaged in adjudicating claims of various sorts; and the Atomic Energy Commission, upwards of 6000.

The size of these staffs reflects both the nation-wide jurisdiction of the agencies and the character of the work they are called upon to perform. Each is charged by Congress with the work of continuing supervision of some field of activity throughout all the forty-eight States.

The Interstate Commerce Commission receives, analyzes, and files thousands of rate schedules, inspects thousands of locomotives and safety appliances, receives thousands of applications to be allowed to do, or to be excused from doing various things, receives complaints, and conducts investigations. The work of the Social Security Board is even greater. It keeps literally millions of records, and will soon dispose of eight or nine hundred thousand claims a year. The Grain Standards Administration supervises over a million gradings of grain a year. These are perhaps striking illustrations, but they are not unrepresentative of the administrative field. Whether an agency is establishing the records or making the decisions upon which claims will be paid, or regulating an industry, or enforcing standards of conduct which cut across industrial divisions, it is made up of a large number of people performing a variety of tasks which have to be coordinated, supervised, and directed toward fulfilling the functions prescribed by Congress. The personnel may include clerks to receive, analyze and file reports and other material; accountants to devise and supervise the keeping of accounts by those whom the agency regulates; engineers skilled in radio, or in land, sea, or air transportation; chemists; biologists; economists to interpret and

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<sup>8</sup> Final Report of the Attorney General's Committee on Administrative Procedure. U. S. Gov't Printing Office, 1941. (Figures revised as of 1954.)

appraise the effect of a given wage rate or other factor upon any business or industry; lawyers and investigators to secure observance of the law.

Out of this solid fact of size, in terms of personnel, flow many troublesome problems of internal organization and delegation of authority

2. *Specialization.*—Administrative agencies specialize in particular tasks and they include specialists on their staffs. The staffs may become such either by experience in the specialized work of the agency or by prior technical or professional training. In many cases a principal reason for establishing an agency has been the need to bring to bear upon particular problems technical or professional skills. A public health agency, for example, must be staffed with people who understand diseases, the Federal Communications Commission with technicians who comprehend the engineering and economic aspects of telegraph, telephone, and radio. In other instances recurring experience with the work of the agency, or with a particular phase of its work may develop specialists—such as are found, for instance, in the Veterans' Administration—who have an insight and judgment which a beginner would lack. In either event a central problem of organization is how best to utilize these skills of training and experience. This does not mean that the heads of the agencies should necessarily be specialists. The problem is rather how to bring into play the technical resources of the agency staff so as to reduce the ultimate points of contention, if such there be, to such compass and form that they can be presented upon an understandable record for decision by the heads of the agency and for review by the courts.

Specialization has further consequences in procedure. Because the members of an agency or of its staff—like persons of similar experience in private affairs—approach problems of administration with a considerable background of knowledge and experience and with the equipment for investigation, they can accomplish much of the work of the agency without the necessity of informing themselves by the testimonial process. . . . Only when differences do not yield to adjustment or when other considerations . . . make formal proceedings desirable need there be resort to the procedures of formal testimony, more familiar in judicial and legislative processes. Even if there is formal procedure, the characteristics of specialization may . . . have an impact upon procedures for formal adjudication.

The same effects are felt in the procedures antecedent to rule making. Here again the function of the formal hearing, in many instances, differs from its function in legislative and judicial methods. In the latter it is the instrument for gathering information. In many administrative rule-making situations . . . the information may be and is obtained by direct investigation and the hearing is most useful as a method of

subjecting it to the criticism of private interests affected and of obtaining the views of these interests upon the desirability of various methods of achieving all or some of the objects sought.

3. *Responsibility for results.*—An administrative agency is usually charged by Congress with accomplishing or attempting to accomplish some end specified in the statute. It may be to see that benefits of some sort are received by persons with whom the agency deals, or that transportation systems or communications systems, or various other business activities are conducted either so as to comply with certain negative requirements or so as to achieve positive results. Taken together, the various Federal administrative agencies have the responsibility for making good to the people of the country a major part of the gains of a hundred and fifty years of democratic government. This means that the agencies cannot take a wholly passive attitude toward the issues which come before them. Out of this fact flow perhaps the most difficult of the problems relating to the administrative process. Administrative agencies constitute a large measure of the motive power of Government; a problem of motive power is a problem also of brakes; but the necessity of both must be faced frankly when either is in question.

4. *Variety of administrative duties.*—No single fact is more striking in a review of existing Federal administrative agencies than the variety of the duties which are entrusted to them to perform. This is true of many single agencies taken alone; it is true, above all, of the agencies taken as a group. This central and inescapable fact makes generalization in description difficult. It makes even more difficult generalization in prescription. For variety in functions means variety in the circumstances and conditions under which the activities of the various agencies impinge upon private individuals. A procedure which would be for the protection of the individual in one situation may be clearly to his injury in another. A set of standards evolved to meet one problem may fail wholly to meet another. One need look no further than a single agency—the Interstate Commerce Commission—to be impressed by the basic necessity of differing procedures for different types of activities, and by the varying procedural patterns which the Commission has evolved to meet this necessity.

## **SECTION 5. CLASSIFICATION OF FUNCTIONS—RULE MAKING, ADJUDICATION, ADMINISTRATION**

In the performance of their varied functions, administrative agencies act as arms not only of the executive, but of the legislature and the judiciary as well. In the first capacity, they carry out many of the tasks which in simpler days were performed personally and individually by department heads. In the second aspect of their work, they adopt rules

and regulations which have much the same force and effect as statute law. In the third instance, they interpret and apply established legal norms and engage in court-like adjudicatory processes.

### Importance of Classification

For a number of reasons, it often becomes important to determine whether a particular function should be classified as legislative, judicial or executive (administrative). Far-reaching legal consequences may depend, in part at least, upon the category into which any particular function of an administrative tribunal is placed. The legal consequences do not, of course, actually and necessarily flow from the classification, and we must avoid the error of regarding classification as a conclusive and magic formula serving to solve the questions that arise. However, we have come to attach certain legal attributes to the functions conventionally placed in each of the three governmental pigeonholes, and as a consequence our courts frequently, and occasionally erroneously, relate the legal consequences to the classification. So classification becomes useful as an aid to the understanding of the judicial attitude toward controversies involving administrative tribunals.

This relationship between classification and legal consequences is well expressed in the Report of the Special Committee on Administrative Law of the American Bar Association, 58 A. B. A. Rep. 407, 410, as follows:

"This differentiation between *quasi*-legislative and *quasi*-judicial functions of administrative tribunals leads to interesting and important implications. In exercising the *quasi*-legislative functions, i. e., in promulgating regulations governing a certain subject matter, the administrative official may be expected naturally to conform to the sort of procedure which has been found best adapted to the making of legislation. Preliminary hearings may be held in cases where this is practicable (they may even be required by statute) but they will resemble the sort of hearing held before a Senate or House committee rather than judicial proceedings, with respect to both procedure and legal effect. When a regulation is adopted, it is not to be expected that its wisdom or expediency will be subject to direct challenge in the courts (although it may be reviewed by a superior administrative tribunal), but its validity both under the Constitution and under the enabling statute may be tested when it is applied to an individual in a later *quasi*-judicial proceeding.

"When, however, the administrative official exercises a *quasi*-judicial function, he may be expected to conform to the sort of procedure which has been found best adapted to the determination of the rights and obligations of the individual in his controversies with other individuals and with the government. Certain fundamental safeguards of notice, opportunity for hearing, and determination or review of issues of fact and of law by an independent tribunal (and eventually, on questions of



law at least, by a court) are involved, and, indeed, are necessary if justice is to be done to the individual. In general, administrative tribunals owe their existence to impatience with the delays and inadequacies of legislative and judicial processes, and to the generally recognized need for expert tribunals engaged in exercising continuous supervision over a given subject matter. In general, also, such tribunals have encountered their chief criticism in allegations that they have gone too far in dispensing with basic safeguards, particularly on the *quasi*-judicial side of their operations. It is in this field that there is the greatest need for intelligent study on the part of the legal profession, and for co-operation with legislatures and with administrative officials.

"It is not always possible, of course, to classify a particular function as *quasi*-legislative or as *quasi*-judicial, for the two shade into each other in cases such as railroad rate orders of the Interstate Commerce Commission. Similarly, it is not always possible to classify a particular function as *quasi*-judicial or executive. In some instances determinations by executive officers are made only after compliance with rigid formalities of notice and hearing, patterned very closely after court procedure; in other instances an informal procedure is observed; and in the vast majority of instances there is no notice or hearing whatsoever. In the last mentioned class (which for the most part, comprises functions which are generally recognized as purely executive in character, and where substantive rights are only incidentally involved), the only control over an official guilty of unjust conduct is either through his superior, or through discipline, or through the effect of his conduct on his continued employment."

In addition to the diversity of legal consequences referred to in the foregoing quotation as attaching to different types of administrative action, we find numerous other points in the law at which it becomes desirable, if not necessary, to determine whether the function being performed is "judicial," "legislative" or "administrative." For example, we find that the power of subpoena and the use of compulsory investigatory processes take on a different complexion in the case of "judicial" action than in the case of action lying in either of the other categories. Again, we discover that the *method* of securing judicial redress from administrative action differs with the type of function involved. Certiorari, mandamus, prohibition and injunction all have their peculiar characteristics. Their availability is affected by the characteristics of the administrative action against which they are directed. Furthermore, the nature of the administrative action may have its bearing upon the *scope* of judicial review, i. e., the extent to which the court will explore and overhaul the conclusions reached by the administrative authorities upon the issues decided by them.<sup>9</sup>

<sup>9</sup> In an article by Green, "Separation of Governmental Powers," 29 Yale L. Jour. 369 (1920), there is a careful attempt to characterize and classify the

### Basis of Classification

The first step in classification is that of definition—and it is not easy. It is just as hard to reach agreement on definitions of “legislative,” “judicial” and “administrative” as it is to agree on a definition of “law” (which Justice Cardozo once defined as a “hypostasis of prophecy”). The classic description, which perhaps serves as well as any other for a working tool, is that of Justice Holmes in *Prentis v. Atlantic Coast Line Co.*, 211 U. S. 210, 226, 53 L. Ed. 150, 29 S. Ct. 67 (1908): “A judicial inquiry investigates, declares, and enforces liabilities as they stand on present or past facts, and under laws supposed already to exist. That is its purpose and its end. Legislation, on the other hand, looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power.” This, of course, leaves us still in the dark as to the meaning of “administrative”—a term which is generally used in a vaguely diminutive sense to describe less important functions which are largely routine, or ministerial, or left to executive discretion.

An example in the field of securities regulation may serve to illustrate the distinction. It is a legislative function to decide whether a law should be adopted requiring that any company proposing to issue shares of stock, and sell them through a “public offering,” should publish a pamphlet containing certain information as to the history, financial condition and future prospects of the company, for the guidance of prospective investors.

If such a legislative rule is adopted, a question might later arise as to the meaning of the term “public offering.” Suppose a company proposes to make an issue of stock available for purchase only by its own employees with ten years or more of service: would that constitute a “public offering”? Decision of this question would be a judicial function.

Further, other questions might arise respecting details not covered by the statute: i. e., how many copies of the pamphlet should the issuing company be required to print? What size type should be used? What size page should be required? Decision as to these details might well be called administrative.

It is sometimes difficult to decide in which category a particular function falls.

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several powers of government. In an article by Friedman, “A Word About Commissions,” 25 Harv. L. Rev. 704 (1912), there is a brief discussion of some of the embarrassments resulting from difficulty of classification of the functions performed by administrative tribunals. A note and comment, “Legislative, Judicial and Executive Powers—Their Distinction—Delegation of Powers,” 15 Ill. L. Rev. 108 (1920), attempts to define the several powers and illustrate the definitions by examples of each.

See also Dickinson, “Administrative Management, Administrative Regulation and the Judicial Process,” 89 U. of Pa. L. Rev. 1052 (1941) for a thoughtful analysis.

Suppose a Public Utility Commission refuses to approve a schedule of proposed charges filed by a telephone company, and notifies the company that unless it presents a more acceptable schedule, the Commission will prescribe one. Is this legislative or administrative or *sui generis*?

Or suppose the Securities and Exchange Commission tells an issuer of stock that unless certain amendments are made in the registration statement or prospectus, the Commission will "consider" the institution of proceedings to enjoin the proposed issuance. What type of function is being exercised in such a case?

Again, suppose the National Labor Relations Board is required to decide, in a particular case, whether the "appropriate bargaining unit" (i. e., the group of employees who will vote on the question of whether they wish to be represented by a union) should be plant-wide, company-wide or industry-wide. Is this decision legislative, judicial or administrative?

One of the great difficulties of properly classifying a particular function of an administrative agency is that frequently—and, indeed, typically—a single function has three aspects. It is partly legislative, partly judicial and partly administrative. Consider, for example, the function of rate-making. It has sometimes been characterized as legislative, sometimes as judicial. In some aspects, actually, it involves merely executive or administrative powers. For example, where the Interstate Commerce Commission fixes a tariff of charges for many railroads, its function is viewed as legislative. But where the question for decision is whether a shipment of a mixture of coffee and chicory should be charged the rate established for coffee or the lower rate established for chicory, the question is more nearly judicial. On the other hand, where the problem is merely the calculation of the total freight charges due for a particular shipment, the determination can fairly be described as an administrative act.

These difficulties of classification have proved as troublesome for the courts as for the law professors. In *Trustees of Village of Saratoga Springs v. Saratoga Gas, Elec. Light & Power Co.*, 191 N. Y. 123, 83 N. E. 693 (1908) the New York Court of Appeals considered a statute delegating to an administrative agency the power to fix prices to be charged by gas and electric utilities. The court said that the fixing of rates was essentially legislative (or at least *quasi*-legislative) in nature. Now, under the New York Civil Practice Act as it existed in 1908, if a proceeding were legislative, it could not be reviewed by certiorari; and it would seem therefore to follow that the writ of certiorari was not available to review the determination of a utility rate by an administrative agency. However, when this argument was pressed upon the court at the next succeeding term—in *People ex rel. Central Park, North & East River R. Co. v. Willcox*, 194 N. Y. 383, 87 N. E. 517 (1909)—the

court was faced with the unhappy realization that if certiorari were not allowed, there would be no conveniently available method for judicially reviewing such rate orders. To avoid this unfortunate consequence, the court with great agility construed its prior decision as really meaning that the fixing of rates was a peculiar type of *quasi*-legislative function which had an overwhelming *quasi*-judicial aspect, and hence an order fixing rates could be reviewed by certiorari.

Despite the difficulties of classification, it remains an unavoidable necessity for the lawyer. No attempt will be made here to suggest any magic formula to solve the problem. By the time one has read all the cases in this volume, it is hoped that he will have arrived at some general idea of the factors which lead courts to classify a particular function as being predominantly legislative, or judicial, or administrative. It is enough for the moment to be aware that this problem of classification exists, and has far-reaching consequences.

There is one aspect of the problem which leads to still further difficulties. That is the distinction between *purely* legislative or *purely* judicial powers, and those which are merely *quasi*-legislative or *quasi*-judicial. (Fortunately, there has been no necessity to differentiate between *purely* and *quasi* administrative powers.) This is a matter which will be examined in some detail in the next chapter.

The Report of the Committee on Ministers' Powers (presented by the Lord High Chancellor to Parliament by command of His Majesty, April, 1932) undertook to explain the meaning of "*quasi*" as follows:

"The word '*quasi*,' when prefixed to a legal term, generally means that the thing which is described by the word has some of the legal attributes denoted and connoted by the legal term, but that it has not all of them. For instance, if a transaction is described as a *quasi*-contract it means that the transaction has some of the attributes of a contract but not all. Perhaps the best translation of the word '*quasi*,' as thus used by lawyers, is 'not exactly.' A '*quasi*-judicial' decision is thus one which has some of the attributes of a judicial decision, but not all."

Expanding this thought, several examples can be suggested. If the legislature prescribes by statute that commercially marketed raspberries must be packed in boxes of uniform size and shape, designed to afford full measure and to protect the fruit in the course of railroad shipment, it can be conceded that it is exercising *purely* legislative power; and further that a duly authorized administrative agency, in deciding the precise shape, size and method of construction of the required boxes, is exercising merely *quasi*-legislative functions. In other words, the agency is acting interstitially, deciding minor details not important enough for consideration by the legislature.

In the judicial field, the following illustration may suggest the distinction which at one time, at least, was thought to inhere in the talis-

manic "*quasi*." Suppose a statute authorized an agency to issue a license as a cab driver to an applicant who demonstrated (a) financial responsibility; (b) habits of sobriety and integrity; (c) exceptional driving ability; (d) capacity to meet the public; and (e) general fitness. In passing on such an application, the agency would take evidence, as a court does, and perhaps hear arguments, as a court does; but when it came to the stage of deciding whether to issue a license, the decision would not depend on application of any well-defined legal standards to the facts, but would be more largely a matter of *ad hoc* discretion. Under such circumstances the act of decision might be called *quasi-judicial*.

But in many instances it is difficult—if not impossible—to say whether a particular decision should be called *purely* legislative or only *quasi-legislative*. For example, in enacting the Motor Carrier Act, 49 Stat. 543, 49 USCA 304, Congress (exercising legislative powers) decided that it was desirable to regulate the hours and working conditions of truck drivers employed by common carriers. Congress was unable to decide whether it was appropriate to provide comparable regulations for truck drivers employed by private carriers. Therefore, it authorized the Interstate Commerce Commission "to establish for private carriers . . . , if need therefor is found, reasonable requirements . . ." When the Commission decided that there was a need to regulate the hours and working conditions of truck drivers employed by private carriers, was it exercising legislative or only *quasi-legislative* powers? In what way is the function of deciding whether it is desirable to regulate the hours of private carrier drivers different from the function of deciding whether it is desirable to regulate the hours of common carrier drivers?

Again, why is it that a workmen's compensation commission is said to be exercising only *quasi-judicial* powers in deciding whether a workman has been injured as a result of his wilful and wanton negligence, whereas a court is exercising *purely* judicial powers in deciding whether a guest passenger has been injured as a result of the wilful and wanton negligence of the driver of an automobile?

Problems as to the validity of these classifications will be considered in the next chapter. The only purpose of this note is to outline the problems of classification that have caused trouble for the courts.

## SECTION 6. DELEGATION OF FUNCTIONS WITHIN THE AGENCY

Quoted from the Final Report of the Attorney General's Committee,  
Pages 20-24

Four of the characteristics of administrative agencies, then, are their size, their specialization, their responsibility for results, and their variety of duties. Each of these characteristics to a greater or less degree,

in turn, contributes to, and necessitates, a highly important characteristic of administrative procedure: delegation. The large staff of an agency, the many duties which the agency is called upon to perform, the necessity of harmonizing its affirmative responsibility for results with its equally important duty of deciding correctly as between the parties in each particular case, and the practical need for the fullest possible utilization of its special skills and expertness—each of these calls for internal organization which involves an allocation of functions among the members and staff of the agency.

For it becomes obvious at once that the major work of the heads of an agency is normally supervision and direction. They cannot themselves be specialists in all phases of the work, but specialists must be immediately available to them. They cannot themselves receive material which must be filed and analyze it. They cannot, and they should not, conduct investigations, determine in every instance whether or not action is required, hear controversies, and at the same time make all the decisions. Administrative procedures must be founded upon the reality that many persons in the agency other than the heads must do the bulk of this work. When agency heads permit themselves to be overwhelmed by detail, they rob themselves of time essential for their most important tasks.

So it will be seen that the very characteristics of administrative agencies necessitate that delegation of function and authority be a predominant feature of their organization and procedure.

1. *Necessity for delegating internal management.*—Delegation must begin with internal management. The Committee has been impressed by the frequent reluctance of high officers, charged with serious policy-making functions, to relinquish control over the most picayune phases of personnel and business management. No reason appears, for example, why the members of one agency must approve, as they do, the travel expense vouchers of its employees, or why the members of another must give, as they do, their personal attention to the assignment of parking spaces in the basement of their building or why the members of a third must themselves pass upon the selection of every employee whose compensation is to exceed \$2,600 per annum. Intelligent conservation of an agency's resources demands the sloughing off of many of these routine tasks by assignment of the work of internal management to an executive officer. It is plainly feasible for a board or commission to designate one or more of its members as a committee to whom the personnel director will report. The Interstate Commerce Commission has long followed such a plan, with marked success. Eight of the eleven commissioners are relieved entirely of the duties of personnel management. One commissioner has stated that the Commission could not continue to operate if all his colleagues were burdened with every question of employment, promotions, and salary increases of more than 2,500 employees.

2. *Necessity for delegation of authority to dispose of routine matters.*—Not only internal management, but nearly every phase of the typical agency's activity demands delegation of authority. In many agencies there are large numbers of more or less formal applications for extension of time or for waiver of requirements, which involve no decision of principle, but merely ascertainment that the facts are as represented. All of these matters should be entrusted to responsible executive officers. For example, in agencies which regulate rates, such as the Federal Power Commission, the Federal Communications Commission, and the Civil Aeronautics Board, it is not essential that each of the agency heads should pass upon routine matters connected with the filing of tariffs such as the waiving of notices. This power should be delegated, and the necessary supervision can adequately be performed by one commissioner instead of all. The Interstate Commerce Commission has delegated this particular power to a single commissioner, and he in turn has in large measure entrusted it to a board of employees. The orders have been issued in the name of the commissioner, but in fact the power has been largely exercised by employees under his general direction, the policies have been determined by the commissioner, and only the novel or difficult cases have been referred to him. Apparently none of the other rate-making agencies has experimented with an equally extensive delegation of this power.

3. *Necessity of delegating authority to dispose of matters informally, or to initiate formal proceedings.*—Authority to decide the next step to be taken after investigation of a matter may properly, and should more often, be delegated. Here it must be understood that delegation may be a matter of degree. It is not true that authority must be delegated completely or not at all. In the collection of taxes, after a return has been audited the question may arise whether to accept the taxpayer's position, or to make an adjustment by agreement, or to assert a deficiency involving formal proceedings. The Commissioner of Internal Revenue cannot decide all these questions. Many, indeed most, are decided by responsible employees under adequate supervision. Only important or novel questions go to the Commissioner and few indeed to the Secretary of the Treasury.

But this method is not universally adopted. The Federal Trade Commission, for instance, in a year's time considers some 2,000 separate cases which have been fully investigated by its Chief Examiner's Division or by its Radio and Periodical Division. The question before the Commission is merely what further action shall be taken—shall the matter be dropped? Shall an effort be made to secure an agreement that the conduct will not be continued? Shall a formal complaint be issued? In every instance the matter comes before the Commission after careful review by one of its most important officials; even in those cases in which its several subordinates have concurred in recommending

that no further action be taken, personal consideration of one commissioner and some consideration by all is nevertheless accorded.

To conserve the time and energy of the agency heads for their primary tasks, matters such as those just mentioned should be delegated. The Committee believes that agencies which have not done so should vest one or more ranking and responsible agency officers with the power, among other things, to issue complaints or otherwise to initiate action. Thus, the National Labor Relations Board permits each of its Regional Directors to issue complaints alleging unfair labor practices after receiving the consent of the Secretary and under the general supervision of the Board. So, too, the Federal Trade Commission should vest in its Chief Examiner and in its Director of the Radio and Periodical Division power to institute formal action within their respective spheres.

The delegation should, of course, be kept within proper bounds. The Committee recognizes not only that public initiation of action may sometimes be crucial insofar as the affected individual is concerned, but also that the choice of cases in which to proceed may constitute the very essence of policy making and development of the law in the field. But these elements can be recognized, and their importance preserved, without a rigid refusal of the agency heads to relax their hold upon all phases of proceedings. Cases of difficulty or novelty should continue to have the attention of the agency heads. But where the matter falls into an established pattern, and where the agency's policies have become crystallized so that little question arises concerning whether a complaint should or should not be issued, the agency heads should be relieved of the duty of making the decision to proceed or not to proceed in each case.

Supervision and control by the agency heads should be retained by three methods: (1) stating for the guidance of agency officials those policies which have been crystallized, and which the responsible officers need only apply to the particular case at hand; (2) consideration by the agency heads of cases for which no such policies have been crystallized or in which application of the policies is difficult; and (3) requirement that the officers in whom is vested the power to issue, or refuse to issue, a complaint, submit a periodic report (either weekly or daily) to the agency heads. If these three devices are utilized, the Committee believes that the agency heads will be able to guide the important work without devoting unnecessary time and attention to routine matters. Similar delegation to high officers in the agency is perhaps even more desirable in respect of settlements and other negotiations looking toward the disposition of cases without hearings. As the Committee will discuss more fully in chapter III of this report, the bulk of administrative action is taken informally. Settlements and agreements close out the great majority of cases before hearing. The flexible and expeditious adjustment of controversies between the Government and individual



citizens is a major objective of the administrative process. Yet the Committee has noted a tendency on the part of some agencies to hinder such adjustment by withholding from all but the agency heads power effectively to settle and negotiate cases. An individual seeking a definitive statement of an agency's position and exploring the possibilities of amicable adjustment may be frustrated because the subordinates with whom he deals are forced to disclaim responsibility or authority. Delays and red tape result, and settlement is discouraged.

The Committee believes that this situation, again, will be considerably relieved and the agency heads themselves will be able to turn their energies to more difficult problems, if there is delegation of power to responsible officers to conduct and approve settlements. And, as in the case of issuance of complaints, effective supervision by the agency heads can be maintained, as many an agency has demonstrated, by requiring that difficult and novel cases be submitted to them, and that, in any event, periodic reports to the agency heads be prepared by the officers.

Closely related to the problem of delegation is that of decentralization. Some agencies have been decentralized to a large extent: The administration of the Longshoremen's and Harbor Workers' Compensation Act by the United States Employees' Compensation Commission, and of the Unemployment Insurance Act by the Railroad Retirement Board, are examples. Decentralization avoids delay and enables the individual citizen to deal with responsible persons in his home locality without the expense of traveling to Washington. The Securities and Exchange Commission has recently made significant experiments in this direction in respect of its registration procedures; so has the Bureau of Internal Revenue. Important factors may militate against complete decentralization: One is the need for uniformity, more important in some agencies than in others; a second is the novelty of an agency's work; a third may be a limited staff. But the Committee is convinced that the convenience of the public may be served and administration improved if those agencies which are in a position to do so will vest in field officers greater powers to deal with the persons whom they regulate. Proper supervision may be retained by careful selection of personnel, by spot checks of field work, by requiring the transmission of files to Washington, and by the preparation of periodic summary reports to the agency heads.

4. *Necessity for delegation of authority and function in formal proceedings.*—In very few agencies can the heads of the agency sit individually or together, to hear the testimony of witnesses in formal proceedings; the press of their many duties is too great. As a result, the practice, common in equity courts, of appointing a special master to hear the evidence and report his findings and conclusions has been widely adopted in administrative procedure.

The need for improving and regularizing this practice and its attendant procedures is great. Chapter IV of this report is devoted to this subject and to the Committee's recommendations. It is mentioned here in order to stress the fact that the problem is merely one of the many which arise from the nature of the tasks which administrative agencies must perform and from the necessities of delegation.

## SECTION 7. A COMPARATIVE VIEW—ADMINISTRATIVE LAW ABROAD

Countries other than our own have set up systems of administrative law and administrative tribunals. In fact in certain portions of the continent of Europe such systems have long been an accepted part of the administration of justice.

In France, a body of administrative law known as the *droit administratif* has been developed as a part of the legal system. It is quite separate and distinct from the civil law. It is this law rather than the civil law that governs the rights of citizens who are aggrieved by official action. Controversies arising in such cases are tried in a system of administrative courts, the principal member of which is the *Conseil d'Etat*, the decisions of which are not subject to review by the ordinary courts. To resolve conflicts between the administrative courts and the ordinary courts there is a tribunal of conflicts, known as the *Tribunal des Conflits*. The *Conseil d'Etat* has built up its own system of case law.

The *droit administratif* has been criticized by English and American jurists as something alien to the genius of the common law. It has been said that since the official is governed by a body of law separate from that which governs the private citizen, and especially since the law is applied by administrative courts, bureaucratic preferences are likely to flow from it. On the contrary, however, it is seemingly true that in many respects the law as developed by the *Conseil d'Etat* is more successful in protecting the rights of citizens against illegal encroachment by administrative officials than is the Anglo-Saxon common law which has but a single body of legal rules for all purposes. The *Conseil d'Etat* has in fact come to be regarded as the especial guardian of the rights and liberties of the French people, and their bulwark of protection against a bureaucratic and highly centralized administration. It occupies a place in the French popular esteem fully as high as that enjoyed by the Supreme Court of the United States among the American people.

It is interesting to note how differently the doctrine of separation of powers, which came to us from French political philosophy, has affected the growth of administrative law in the two countries. In France the doctrine, together with the early distrust of the civil courts, has produced a practically complete separation of the administrative

courts from interference by the ordinary courts. With us on the other hand separation of powers, together with our due process clauses, is used as a device to confer upon the courts the power of review of administrative action. It is thus used as a device which, far from producing a separation of areas of action, instead gives the judiciary a potent means of control over administrative officers.

In Germany the methods of disposing of controversies between officials and private persons are different in different parts of the country. The procedure is decentralized, there being no central national system of administrative courts as in France. Even the local development of administrative courts has been a fairly recent occurrence. With one or two exceptions no administrative courts existed in Germany until the last quarter of the nineteenth century. German doctrinal writers did not commence to treat the subject in a serious way until nearly the end of the century. In some of the states of the Reich administrative controversies are still tried before the ordinary courts; in others administrative courts similar to those of France have been created. Although there is a provision in the Constitution of the Reich for the creation of the *Reichsverwaltungsgericht*, a federal administrative court, with general jurisdiction like that of France, the court has not as yet been constituted. Such federal administrative tribunals as exist are of limited jurisdiction, e. g., over social insurance matters, over taxation, etc. In short, the German system of administrative tribunals may be properly characterized as nonsystematic and only partially developed as compared with that of France and, of course, the war halted all development of a significant nature.

In England a remarkable development has taken place in the last quarter century. The "rule of law" has long been regarded as an essential feature of English constitutional doctrine. Some sixty years ago when the great English constitutional law authority, A. V. Dicey, wrote his *Law of the Constitution*, he asserted that administrative law as found in France under the name of *droit administratif* was an alien to the common law, unknown and undesired in England, and something to be shunned. He was satisfied that the official hierarchy should be subject to the same law and the same tribunals as those provided for private persons. He believed that a system of administrative law would give officialdom an undesirable preference. He was an unqualified exponent of the "rule of law."

Mr. Dicey lived to see the alien invade his native soil; to see numerous and important judicial and legislative powers conferred upon ministers and upon administrative officials. At no time did the development assume the systematic form of the French administrative courts, but rather it consisted simply of a series of individual instances of the transfer by Parliamentary enactment of discretionary powers over certain private rights to administrative officers. This was constitutional heresy to Dicey

because it ran counter to the "rule of law." To the extent that administrative officials were given discretion to deal with and make disposition of private rights, they were enabled to escape the "rule of law." Private rights to that extent became subject to administrative power with no redress in the courts.

Mr. Dicey lived to read two significant English decisions concerning this new development and recognizing its presence in England. They were *Board of Education v. Rice*, [1911] A. C. 179 and *Local Government Board v. Arlidge*, [1915] A. C. 120. The latter decision Mr. Dicey regarded as particularly alien in nature, since in effect it permitted the administrative condemnation of private property without the protection of judicial procedures. He felt sufficiently disturbed by the cases to write an article concerning them. ("The Development of Administrative Law in England," 31 L. Q. Rev. 148 (1915).) In the article Mr. Dicey acknowledged with misgivings that "a considerable step" had been taken to introduce into England "something like the *droit administratif* in France."

As time went on, and particularly after World War I, the practice of conferring upon English administrative officers both rule making and judicial powers assumed vast proportions. In 1929 Lord Hewart of Bury, Lord Chief Justice of England, taking note of the practice, wrote a book entitled "The New Despotism" concerning it and condemning it with all the vigor at his command. Partly as a result of Lord Hewart's volume, and partly because of other considerations, Lord Sankey, Lord High Chancellor of Great Britain, appointed a committee known as the Committee on Ministers' Powers, commissioned "to consider the powers exercised by or under the direction of (or by persons appointed specially by) ministers of the Crown by way of (a) delegated legislation, and (b) judicial or *quasi*-judicial decision, and to report what safeguards are desirable or necessary to secure the constitutional principles of the sovereignty of Parliament and the supremacy of the law."

The report of the committee was presented in 1932 (Report of Committee on Ministers' Powers, 1932, Cmd. 4060). It, together with two supplementary volumes, contains a splendid exposition and analysis of the extent to which administrative law has invaded England. Suffice it to say that while no separate system of administrative courts applicable to officialdom has developed as in France, the total quantity of comparatively independent discretionary power of both a judicial and a legislative nature exercised by administrative officials is very considerable indeed. The "rule of law" has to a measurable degree been supplanted by administrative justice.

At a number of points in the chapters to follow the findings and conclusions of the Committee on Ministers' Powers are either referred to or

quoted. The report is an important contribution to the literature on the subject.<sup>10</sup>

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<sup>10</sup> Continental European administrative law is described and evaluated in the following periodical articles: Garner, "French Administrative Law," 33 Yale L. Jour. 597 (1934); Garner, "Anglo-American and Continental European Administrative Law," 7 N. Y. Univ. L. Q. Rev. 387 (1929), a comparative analysis; Duguit, "The French Administrative Courts," 29 Pol. Sci. Q. 385 (1914); Borchard, "French Administrative Law," 18 Iowa L. Rev. 133 (1933); Feller, "Tendencies in Recent German Administrative Law Writing," 18 Iowa L. Rev. 144 (1933); Berthelemy, "The 'Conseil d'Etat' in France," 12 J. Comp. Leg. (3d Series) 23 (1930); Uhlman and Rupp, "The German System of Administrative Courts," 31 Ill. L. Rev. 847 (1937); Rava, Italian Administrative Courts under Fascism, 40 Mich. L. Rev. 654 (1942).

English and Canadian administrative law are described and discussed in the following periodical articles: Carr, "Administrative Law," 51 L. Q. Rev. 58 (1935); Kennedy, "Aspects of Administrative Law in Canada," 46 Jurid. Rev. 203 (1934).

A comparative analysis of the French and Anglo-American systems of administrative law is afforded by Bernard Schwartz, *French Administrative Law and the Common-Law World* (New York University Press, 1954).

## CHAPTER II

### ADMINISTRATIVE DISCRETION AND ITS CONTROL

#### SECTION 1. ADMINISTRATIVE DISCRETION—ITS SOURCE AND NATURE

*Discretion* is a slippery word. There is no single established definition. Webster's Dictionary gives, among several other variant meanings: (1) "unrestrained exercise of will; (2) quality of being discreet—circumspection, judiciousness." Different writers use the term *discretion* with widely variant connotations and implications.

For purposes of the present discussion, the term *discretion* will be taken to mean that more or less limited range within which agencies may choose freely between alternative courses of action, basing decision on *ad hoc* considerations. It might be said that *discretion* is that sort of power which is vested in an agency when the legislature feels there ought to be a law to deal with some current problem, but cannot decide in detail just what the law should provide, and accordingly adopts a statute declaring the general objectives which should be accomplished and granting to an administrative agency (within stated limits) the duty of working out the best ways to accomplish those objectives.

More specifically, the sources of administrative discretion are fourfold:

(1) The agency may be granted the power to adopt substantive rules, having the force of law (more or less), and compelling or prohibiting certain action on the part of those subject to the agency's jurisdiction. For example, agencies may be empowered to decide what minimum wages must be paid, what information must be given to the public in connection with a sale of corporate stock, what safety devices must be put on steam engines, etc. In these cases, an administrative agency acts like a "little legislature" and, within the limits of the authority delegated to it, exercises the same sort of discretionary powers as those exercised by the legislature.

(2) Discretionary power exists where an agency is given a vague, indefinite standard to apply in the adjudication of individual cases. For example, the Renegotiation Act of 1942 (56 Stat. 982) authorized an agency to review the profits made by government contractors, and to order the contractor to refund such part of the profits as the agency found to be "excessive." In applying so vague and loose a standard in its adjudication of individual cases, the agency obviously enjoyed a broad measure of discretion.

The two foregoing illustrations cover the chief sources of administrative discretion, and illustrate the two types of discretionary power with which, in this course, the student will be principally concerned. Indeed, it is these two types of discretionary power with which the legislatures and the courts are principally concerned. However, for the sake of a more nearly complete analysis, two other sources of discretionary power should also be mentioned.

(3) Sub-delegation of authority within an agency sometimes results in the vesting of broad discretionary powers in a single individual. When a statute is adopted, delegating to a five member Board, let us say, the power to determine in each case what particular portion of a company's employees should be grouped together as an "appropriate unit" for purposes of collective bargaining, it is often assumed that the combined wisdom and judgment of the five distinguished citizens comprising the Board will be reflected in the decisions that are made. In practice, however, such a Board may have to decide such issues in several hundred cases each year. This may necessitate the Board's delegating to each of its five separate members the power to consider cases individually and to "recommend" to the other four members what decision should be made. The Board members may find themselves too busy to study the cases assigned to them, and ask their staff assistants to make the detailed study and recommend to the individual Board member what decision should be made, so that he may pass the recommendation along to the other members of the Board for their rubber-stamped approval. Sub-delegation of authority may thus lead to the vesting of substantial discretionary powers in staff assistants, whose decisions in individual cases will in part reflect their personal ideas and judgments, rather than the combined group judgment of the principal officers of the agency.

(4) The discretionary powers above described may on occasion be extended further by virtue of the pervasive tendency of administrative agencies to construe broadly their statutory grants of power, to the end of extending their jurisdiction and at times, perhaps, giving effect to policies beyond those of the statute creating the agency.<sup>1</sup>

This particular source of administrative discretion has been commented upon in the Hoover Commission Task Force Report on Legal Services and Procedure, pp. 220-221 (1955):

*"Limitations of Authority.*

*"All administrative agencies are instrumentalities of the Congress. The authority which they exercise must be based upon congressional delegation. Action which goes beyond the authority thus conferred may be invalidated by the courts as ultra vires.*

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<sup>1</sup> For a more detailed discussion of this aspect of the problem, see Pound, *Administrative Law* (1942) pp. 70-73; Cooper, *Administrative Agencies and the Courts* (1951) pp. 223-235.

"One of the reasons Congress confers administrative powers upon departments and agencies of the executive branch is that it is not possible to foresee all the demands which may have to be met in the course of regulatory functions. It is easier for departments and agencies to promulgate rules to meet changing circumstances than it would be for Congress to amend statutes. It is inevitable that problems will be encountered by administrative authorities which were not foreseen by the drafters of the primary legislation. In such circumstances, the question which the administrators must face is whether to broadly construe the authority granted them, or go back to Congress for more specific power.

"In the formative periods of administrative law, it may well be that broad constructions of administrative authority were necessary to enable the administrative process to work. But, in principle, delegated powers should be strictly construed. Otherwise, the constitutional authority of the Congress tends to become diluted by being spread throughout various departments and agencies of the executive branch.

"The problem has troubled the courts. See, for example, *Federal Communications Commission v. American Broadcasting Co.*, 347 U. S. 284 (1954); *Federal Power Commission v. Panhandle Eastern Pipeline Co.*, 337 U. S. 498 (1949); *Interstate Commerce Commission v. Meehling*, 330 U. S. 567 (1947); *Addison v. Holly Hill Fruit Products, Inc.*, 322 U. S. 607 (1944). And it concerned Congress, too, in enacting the Administrative Procedure Act, section 9 (a) of which, 5 U. S. C. § 1008 (a) (1952), provides:

"No sanction shall be imposed or substantive rule or order be issued except within jurisdiction delegated to the agency and as authorized by law."

"Commenting on this provision, the Senate Judiciary Committee stated, Sen. Doc. 248, 79th Cong., 2d sess. 211 (1946):

"This subsection embraces both substantive and procedural requirements of law. It means that agencies may not undertake anything which statutes or other appropriate sources of authority (such as treaties) do not authorize them to do. . . . In particular, agencies may not impose sanctions which have not been specifically or generally provided for them to impose. Thus, an agency which is authorized only to issue cease-and-desist orders may not set up a licensing system; and conversely a licensing authority may not assume to issue desist orders. A rule making authority may not undertake to adjudicate cases, and vice versa. Of course, some statutes confer upon the same agency authority to exercise more than one of these forms of regulation. An agency authorized to regulate trade practices may not regulate banking, and so on. Similarly, no agency may undertake directly or indirectly to exercise the functions of some other agency. The subsection confines each agency to the jurisdiction delegated to it by law."

"The task force has sought to accommodate the need of agencies to act in circumstances not foreseen by Congress in delegating power to them with the need to protect private parties from the consequence of agency actions which contravene existing law. The task force recognizes that a certain latitude must be allowed agencies in construing statutory grants of authority. But it does not believe that sanctions should be imposed upon any person except within the letter, and also within the purpose and intent, of Congress in enacting the legislation."



## SECTION 2. THE PROBLEM OF DISCRETION

The central problems of administrative law are, at heart, those involving agency discretion. Granting either too little or too much discretion to an agency produces unsatisfactory results.

The granting of appropriate discretionary powers to the agencies is necessary to the effective performance of their tasks. Indeed, as pointed out in Chapter I, one of the principal reasons for their creation was the circumstance that in the development of social control of private affairs situations are encountered where the precise rule of action to be enforced is not apparent and where accordingly the matter in hand cannot effectively be regulated by general rules, but only by the exercise of discretion in particular cases. Granting too little discretionary power would prohibit the achievement of the very purpose sought to be accomplished in creating the agency.

On the other hand, granting a larger measure of discretionary power than is required by the nature of the case, results *pro tanto* in the establishment of a government by men, rather than government by law (i. e., government according to the discretion of administrative officers, instead of government according to the language of the statute). When broad, effective discretionary power is vested in an administrative agency, to a large extent that agency displaces the legislature in the ordinary day-to-day control of that segment of governmental activity included within the jurisdiction of the agency.<sup>2</sup>

Similarly, the vesting of broad discretionary powers in an agency results in a corresponding diminution of the powers of the judiciary, in the areas committed to agency control. To the extent that room is left for administrative discretion in applying the law to specific cases as they arise, to that extent is the power of judicial review suppressed. An act of true discretion, referable to no fixed standard except governmental desire, is not appropriate for judicial review. Control of discretion is not a typically judicial function, nor is there promise of any assured gain to

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<sup>2</sup> It has been argued that the conferring of discretion upon administrative officers should be deemed a mere temporary expedient, and that as soon as experience points out the proper rule to apply, the legislature should by amendment sharpen the standards guiding administrative action to the end that administrative discretion shall be kept at a minimum, and the body of law shall at all times be kept as certain as possible.

However, there is a growing tendency to regard resort to administrative discretion as an essential concomitant of modern governmental regulation. Certain it is that the more recent statutes conferring administrative powers employ discretion with a generous hand. For example, it is doubtful whether any statute of comparable importance has conferred anything like so much discretionary administrative power as the provisions of the Atomic Energy Act of 1946 and 1954, granting to the Atomic Energy Commission broad powers over the production and utilization of fissionable materials.

be derived from superimposing the discretion of the judge upon that of the administrator. The most the courts can do is to ascertain whether the administrative action has exceeded the limits of the delegated discretion. In short, the judicial control of administrative action varies inversely with the scope of administrative discretion.<sup>3</sup>

Fundamentally, in other words, the problem of discretion is that of determining the appropriate division of governmental authority between the legislature, the courts and the agencies.

In addition to this underlying philosophical question, there are a number of other comparatively minor but nevertheless troublesome practical difficulties that flow from the delegation of broad discretionary powers to governmental agencies.

The possession of such powers sometimes engenders in an agency some impatience about following the time-consuming course of deciding each case on the basis of careful and painstaking consideration of all the evidence produced in the slow-moving process of a contested hearing. Discretion can be exercised more freely when cases are decided without a hearing, or without hearing both parties.<sup>4</sup>

Again, it has been charged that reliance on the role of discretion has disinclined some agencies to make available for the use of interested parties any clear statements either of the exact practice and procedure of the agency or of the criteria relied on by the agency in deciding cases.<sup>5</sup> Discretion can be exercised more freely if procedural matters can be settled in accordance with the agency's convenience in each case, and if the agency has reserved the privilege of deciding each case on its "merits," permitting such departures from prior criteria of decision as may seem expedient.

### SECTION 3. STATUTORY STANDARDS AND THE BREADTH OF DISCRETION

Only in rare cases has a legislature seen fit to vest in an administrative agency complete and uncontrolled discretionary powers.<sup>6</sup> Usually, the statute creating an agency limits its discretion by setting up standards to which the agency must conform, in carrying out its functions.

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<sup>3</sup> "As the field of discretion of the council in regard to circumstances which dictate granting of consent is enlarged, opportunity for the intervention of the courts becomes restricted. Into the field of legislative or administrative discretion the courts may not enter." *Larkin Co., Inc. v. Schwab*, 242 N. Y. 330, 151 N. E. 637 (1926).

<sup>4</sup> Reports of American Bar Association's Special Committee on Administrative Law, 63 A. B. A. Rep. 331, 346 (1938); 64 A. B. A. Rep. 575 (1939); Pound, *Administrative Law* (1942), pp. 68-73.

<sup>5</sup> Sec. 3 of the Federal Administrative Procedure Act of 1946, ch. 324, 60 Stat. 237, 5 USCA 1003, imposes certain requirements for the publication of such information.

<sup>6</sup> Constitutional limitations, as well as notions of governmental policy, tend to preclude such uncontrolled grants of power.

A classic example of the effect that such statutory standards serve in channeling administrative discretion is reflected in *City of Monticello v. Bates*, 169 Ky. 258, 183 S. W. 555 (1916). Involved in that case were two municipal ordinances. An enactment of 1904 prohibited the erection of any building within the city "except by permission of the board of trustees." Their discretion was unlimited except perhaps by the general implied standard of reasonableness to which all official action is supposed to conform. The ordinance was held invalid, and the following year a new one was adopted, including the following standard: "The board of trustees . . . shall not grant a permit to any person . . . to erect or repair any building, except of brick or stone to be covered with a metal or slate roof. . . ." Under the latter ordinance, virtually no discretionary power whatsoever remained with the officials. If the proposed building was to be erected of brick or stone, the permit must issue.

Between these maximum and minimum limits there lies a whole range of possible degrees of discretion, depending upon the particular language used in drafting the "standard" which guides the hands of the administrative officers. To the extent that the standard employed is not susceptible of exact objective proof is discretionary power conferred upon the officers.

Some of the words commonly employed in formulating standards for administrative action have, by constant use and by judicial interpretation, acquired a precision of meaning approaching, though by no means equaling, the words "brick and stone" in the second ordinance in the Monticello case. In this class, for example, are such expressions as "reasonable rates," "unreasonable preferences," "discrimination," "monopoly" and "reasonable rate of speed." These are fairly well defined standards, and the degree of administrative discretion conferred under them, while considerable, is nevertheless limited to a great extent by accepted use and interpretation.

However, other frequently used terms refer to much vaguer concepts, and correspondingly give a wider play to administrative discretion. For example, we find in common use such terms as "adequate," "advisable," "appropriate," "beneficial," "competent," "convenient," "detrimental," "expedient," "equitable," "fair," "fit," "indispensable," "necessary," "practicable," "proper," "reputable," etc. These terms are only by the greatest stretch of the imagination susceptible of proof or disproof by objective testimony, and hence their discretionary content is high.

Still again, one frequently sees direct reliance upon the "beliefs," "judgment" or "discretion" of the administrative officers, and in such cases the discretionary power is to all appearances as broad as the limits within which reasonable men may honestly entertain views. For example, in *Mutual Film Corp. v. Industrial Commission of Ohio*, 236 U. S. 230, 59 L. Ed. 552, 35 S. Ct. 387 (1915), the court was asked to pass upon a

film-censoring statute which provided that "Only such films as are in the judgment and discretion of the board of censors of a moral, educational or amusing and harmless character shall be passed and approved by such board." Against the contention that it amounted to an unconstitutional delegation of legislative power, the statute was held valid, the court saying that the law may properly rely in such situations upon "the sense and experience of men." Under such language discretion would seem to be limited only by the broad consideration that it must be exercised in a non-capricious manner.

The problem of selecting appropriate standards to guide administrative discretion remains current.<sup>7</sup> The Hoover Commission Task Force Report on Legal Services and Procedure (1955), pp. 21-22, makes the following observations:

"Legislative Delegations of Authority.

"Administrative agencies exercise powers delegated to them by Congressional enactment. The scope of the meaning of these powers is sometimes inadequately formulated in the enabling legislation. Vague and general statutory terms confer an unnecessarily broad range of discretionary authority upon the administrative officials entrusted to carry out legislative objectives. Such grants of authority, inadequately limited by statutory safeguards and standards, are encountered throughout the administrative process. Authority delegated by the Congress to departments and agencies should be clearly and precisely defined in enabling legislation to insure compliance with legislative intent. Reasonable steps should be taken to sharpen and improve the legislative standards prescribed to guide administrative action.

"More careful drafting of standards in such enabling legislation may serve several desirable ends. It should canalize administrative discretionary authority, assure necessary protection of private rights affected by the exercise of such authority, and afford the citizen subject thereto a better understanding of the content and meaning of laws with which he is expected to comply. It should enable the courts to provide more satisfactory redress in the event the department or agency oversteps the limits of Congressional intent. And finally, by rendering more definite and certain the boundary lines of authority, the departments and agencies will themselves be helped by the minimization of inter-governmental disputes and economy of operation."

Sometimes, after an agency has been allowed an initial period of experimentation under a very loose standard, Congress has found it desirable to redefine and tighten the standard imposed to limit agency discretion. When a new agency is created, it is often for the purpose of conducting a social experiment, and discovering the most practical way of regulating a new problem. It may be necessary, upon venturing into a new field of governmental regulation, to grant the agency wide discretionary powers. As experience defines the contours of the problem

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<sup>7</sup> See Comment, "Legislation—Requirement of Definiteness in Statutory Standards," 53 Mich. L. Rev. 264 (1954).

involved, opportunities may be afforded to redefine the standards which guide administrative action.

Under the original National Labor Relations Act, 49 Stat. 449, 29 USCA 151, the National Labor Relations Board was given extremely broad discretionary power to define the "appropriate unit" for collective bargaining. The standard was:

"(b) The Board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof."

Under this broad standard, the Board in some cases included skilled tradesmen in plant-wide bargaining units dominated by unskilled labor, and sometimes included watchmen and guards in the same unit with production employees. Not satisfied with the results, Congress, in adopting the Labor-Management Relations Act, 1947, 61 Stat. 136, 29 USCA 141, redefined the standard as follows:

"(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: *Provided*, That the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; or (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation or (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.

"(5) In determining whether a unit is appropriate for the purposes specified in subsection (b) the extent to which the employees have organized shall not be controlling."

#### SECTION 4. CONSTITUTIONAL LIMITS UPON ADMINISTRATIVE DISCRETION

**Dowling v. Lancashire Ins. Co., Supreme Court of Wisconsin, 1896.  
92 Wis. 63, 65 N. W. 738.**

PINNEY, J. The action is upon a "Wisconsin standard policy of fire insurance," prepared, approved, and adopted by the insurance commis-

sioner under ch. 195, Laws of 1891, which contains the condition that the policy shall be void "if the subject of insurance be personal property and be or become incumbered by a chattel mortgage," and also the stipulation that "no officer, agent, or other representative of the company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement indorsed hereon or added hereto, and as to such provisions and conditions no officer, agent, or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto." The only waiver relied on in respect to the chattel mortgage to Ann Dowling was by parol, and the question was whether, under such policy and the act under which it was adopted, such waiver was ineffectual, so that by the breach of the condition in relation to chattel mortgages the policy was rendered void. The Circuit Court having ruled that the parol waiver relied on was valid, the plaintiffs obtained a verdict; and it is contended in support of it that ch. 195, Laws of 1891, is unconstitutional and void, as a delegation to the insurance commissioner of legislative power, which the Constitution (art. IV, sec. 1) declares "shall be vested in a senate and assembly," and that such parol waiver was effectual and valid under the law as it existed before the passage of said act.

That no part of the legislative power can be delegated by the legislature to any other department of the government, executive or judicial, is a fundamental principle in constitutional law, essential to the integrity and maintenance of the system of government established by the Constitution. The difficulty experienced by courts in distinguishing between legislative power, which cannot be delegated, and discretionary powers of an executive or administrative character, which may be intrusted to other departments or officers in the conduct of public affairs, has been frequently experienced and acknowledged; and it arises, in a great measure, from the fact that powers of the most important character, not essentially legislative, but which the legislature might properly, in the first instance, exercise or determine by its own judgment, are frequently devolved by the legislature upon other departments, officers, or bodies. . . .

Where an act is clothed with all the forms of law, and is complete in and of itself, it may be provided that it shall become operative only upon some certain act or event, or, in like manner, that its operation shall be suspended; and the fact of such act or event, in either case, may be made to depend upon the ascertainment of it by some other department, body, or officer, which is essentially an administrative act. In all such cases it is upon the occurrence of the fact or event that the act becomes operative or its suspension is accomplished. . . .

In considering the true test as to whether a power is strictly legislative, or whether it is administrative and merely relates to the execution of the law, *RANNEY, J., in Cincinnati, W. & Z. R. Co. v. Clinton Co. Com'rs*, 1 Ohio St. 88, said: "The true distinction is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done. To the latter no valid objection can be made." . . .

The application of the distinction so well established and clearly pointed out in these cases is, we think, decisive of the validity of the act in question. Its object was to provide for a uniform policy of fire insurance, to be made and issued by all companies taking such risks, so that no other than the standard policy, prepared, approved, and adopted by the insurance commissioner, could be lawfully issued or used within the state. Indeed, to issue or deliver any other than the standard policy was made a misdemeanor and punishable by a fine. *Bourgeois v. N. W. Nat. Ins. Co.*, 86 Wis. 609. Although the act provided for a "printed form in blank of a contract or policy of fire insurance, together with such provisions," etc., it provides also that they were to form a part of such contract or policy, so that the essential substance of the contract required to be embraced in such form should have the sanction, force, and effect of a legal enactment; and, as applicable to the present case, the stipulations of such policy would operate, under the act, to change the law as it had previously existed in relation to parol waiver of forfeitures by the conditions of fire insurance policies. The act, in our judgment, wholly fails to provide definitely and clearly what the standard policy should contain, so that it could be put in use as a uniform policy required to take the place of all others, without the determination of the insurance commissioner in respect to matters involving the exercise of a legislative discretion that could not be delegated, and without which the act could not possibly be put in use as an act in conformity to which all fire insurance policies were required to be issued. Giving full effect to all the language of the act, as we must do, it provides that the insurance commissioner shall, within sixty days of the passage of this act, *"prepare, approve, and adopt a printed form in blank of a contract or policy of fire insurance, together with such provisions, agreements or conditions as may be indorsed thereon or added thereto and form a part of such contract or policy; and such form shall, as near as the same can be made applicable, conform to the type and form of the New York Standard fire insurance policy, so called and known; provided, however, that five days' notice of cancellation by the company shall be given, and provided, that proof of loss shall be made within sixty days after a fire."* The insurance commissioner was authorized to call upon the attorney general "for such assistance as shall seem necessary in the preparation" of such policy, and it was the duty of the attorney gen-



eral to perform such service. The insurance commissioner was required, on or before September 1, 1891, to file in his office the printed form in blank of such contract or policy, and immediately thereafter he was to have 500 copies of the same, with this act, printed, and to mail to each company doing a fire insurance business in the state copies of the same. The fourth section provides that after September 1, 1891, no such insurance company shall use any other form of policy, and "no other or different provision agreement, condition or clause shall, in any manner, be made a part of said contract or policy or be indorsed thereon or delivered therewith, except" that certain "riders" may be used, which are in no case to be "inconsistent with or a waiver of the conditions of the standard policy" therein provided for.

It was impossible to adopt the New York standard policy without repealing certain statutes of this state on the subject of fire insurance, directly contravening the provisions of such policy, viz., the valued policy law and the insurance agency law. R. S., §§ 1943, 1947. The act did not contain any repealing clause, but its evident intention was that the various statutory provisions existing upon the subject of cancellation of policies, and under the by-laws, rules, and regulations of companies made pursuant to their charters, and in respect to proof of loss, should be repealed; for it was provided that five days' notice of cancellation should be given, and proof of loss should be furnished within sixty days after the fire. The New York standard policy provides that proof of loss shall be furnished within sixty days after the fire, "unless such time is extended in writing by the company,"—a provision omitted from the Wisconsin policy, as approved and adopted, as well as the provision of the New York policy that "no suit or action on this policy shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, or unless commenced within twelve months next after the fire," to avoid, it is said, conflict with §§ 4219, 4222, R. S., of the general statutes of limitation.

As the legislature could not, for reasons thus indicated, adopt the New York standard policy, the power was so delegated by the act to the insurance commissioner, to prepare, approve, and adopt a printed form in blank of a contract or policy of fire insurance, etc., which would "*as near as the same can be made applicable*, conform to the type and form of the New York standard fire insurance policy." The result was that, until the discretion vested in the commissioner should be exercised and such form was so approved and adopted, no business of insurance could be transacted under the act. Until then the act was ineffectual, for want of certainty. Evidently, the conformity to "type and form" of the New York standard policy had reference to the form of that policy as embracing the substance of the provisions of the contract, and as to the size and kind of type to be used in printing the policy to be adopted. Had the commissioner wholly declined to prepare, approve,



and adopt any form whatever, it would not have been possible to have carried into effect so imperfect or uncertain an enactment, or to transact business under it. Within the lines indicated, a discretion was reposed in the commissioner as to the form of the policy which embodied the substance of the contract, and which was to have the sanction and force of law. The effect, clearly, was to transfer to him bodily the legislative power of the state on that subject. Within the limits prescribed, he was to prepare just such a policy or contract as, in his judgment and discretion, would meet the legal exigencies of the case, and no one could certainly predict what the result of his action might be. It was not to be published, as laws are required to be, or to be approved by the governor. It was to be filed in the office of the insurance commissioner, instead of being deposited in the office of the secretary of state, and its use was to be enforced by the penal sanction of the act. He was not required by the act to perform any mere administrative or executive duty, or to determine any matter of fact for the purpose of executing or carrying the act into effect.

The result of all the cases on this subject is that a law must be complete, in all its terms and provisions, when it leaves the legislative branch of the government, and nothing must be left to the judgment of the electors or other appointee or delegate of the legislature, so that, in form and substance, it is a law in all its details *in praesenti*, but which may be left to take effect *in futuro*, if necessary, upon the ascertainment of any prescribed fact or event. Instead of preparing a form of standard policy and adjusting it to the existing legislation, or modifying such legislation, if necessary, by virtue of its constitutional functions, the legislature delivered over this task wholly to the insurance commissioner, to accomplish it as nearly as might be; and this depended wholly upon his discretion and judgment as to what the law should be in this respect, for the act had not specifically declared it. Conceding that the legislature might have adopted the New York form as an entirety by the use of general language, it is evident that the proposed form, to conform "as near as can be to the form adopted in New York," involved a duty equivalent to that of revision, which it cannot be contended could be delegated, except subject to legislative approval. While the commissioner, within the discretion intrusted to him, might have approximated in a great degree to the policy which the legislature may have intended, the objection, in view of the consideration stated, that it has not received the legislative sanction, is necessarily fatal to it. . . .

It does not appear that any ground exists for a reversal of the judgment.

By the court.—The judgment of the Circuit Court is affirmed.<sup>8</sup>

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<sup>8</sup> Mr. Justice Ranney's statement of "the true test," quoted in the principal case, has proved an attractive catch phrase, leading the supreme courts of many

**State ex rel. Wisconsin Inspection Bureau v. Whitman, Supreme Court of Wisconsin, 1928. 196 Wis. 472, 220 N. W. 929.**

[This is a proceeding to review and annul an order of the Insurance Commissioner disapproving certain rules and regulations of the Wisconsin Inspection Bureau, an insurance rating bureau, set up by fire insurance companies under the provisions of the Wisconsin Statutes concerning the regulation of insurance companies. The Circuit Court had annulled the order and an appeal had been taken to the Supreme Court.]

ROSENBERRY, J. No case coming to the bar of this court can be treated or considered as unimportant. Some cases by reason of the public interests involved, the complexity of the problems presented, the magnitude of the interests affected, are of unusual importance. We recognize the fact that this is one of the second class and have given it the careful and thoughtful consideration which its importance demands.

The commissioner of insurance is an administrative officer. The office has long been known to the law. Because it was among the earlier administrative agencies created, the laws delegating powers to insurance commissioners were very closely scrutinized and a rather rigid and inflexible application was made of the doctrine of separation of powers and its corollary that powers once vested cannot be redelegated. These earlier cases have continued to exert a restrictive influence upon the development of the powers of commissioners of insurance, whereas stat-

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states to hold statutes invalid as unconstitutional delegations of legislative power.

In addition to Wisconsin, the supreme courts of Michigan, Minnesota, Pennsylvania and Missouri have held that the legislature cannot delegate to an insurance commissioner the power to prescribe forms of standard policies of insurance, even though the statutes have indicated the general character of the forms so to be prescribed. *Anderson v. Manchester Fire Assur. Co.*, 59 Minn. 182, 60 N. W. 1095 (1894); see also *ibid.*, 63 N. W. 241 (1895); *O'Neil v. American Ins. Co.*, 166 Pa. St. 72, 30 Atl. 943 (1895); *King v. Concordia Fire Ins. Co.*, 140 Mich. 258, 103 N. W. 616 (1905); *Nalley v. Home Ins. Co.*, 250 Mo. 452, 157 S. W. 769 (1913); *Phenix Ins. Co. of Brooklyn, N. Y. v. Perkins*, 19 S. D. 59, 101 N. W. 1110 (1905). But contra, see *State ex rel. Martin v. Howard*, 96 Neb. 278, 147 N. W. 689 (1914); *Travelers' Ins. Co. v. Industrial Commission*, 71 Colo. 495, 208 Pac. 465 (1922). See Patterson, "The Insurance Commissioner in the United States," pp. 248-258, for a discussion of the legislation and decisions thereunder.

Of similar purport so far as the constitutional question is concerned is *State ex rel. Adams v. Burdge*, 95 Wis. 390, 70 N. W. 347 (1897), holding invalid a rule of a state board of health prohibiting unvaccinated children from attending school. The board was given power by statute to adopt "rules and regulations for the preservation of public health." Contra, *Blue v. Beach*, 155 Ind. 121, 56 N. E. 89 (1900), in which the cases on the subject are thoroughly analyzed. See also *Schaezlein v. Cabaniss*, 135 Cal. 466, 67 Pac. 755 (1902), holding that the Commissioner of Labor could not be given power to decide whether the installation of a mechanical device in a factory is necessary to prevent injury to workmen and to order the installation of such device.

utes creating other administrative agencies passed at a later date have received a much more generous and tolerant treatment than was accorded the early laws delegating powers to commissioners of insurance.

The first question raised relates to the extent of the power which the legislature by the enactment of the rating law intended to confer upon the commissioner of insurance. This involves a consideration of the entire act and specifically section 203.36, Stats. The significant words are as follows:

"All regulations or rules of any such rating bureau shall be filed with the commissioner of insurance, and no such regulations or rules shall be in force before such filing, nor, in any case, after written order by the commissioner of insurance, disapproving such regulations or rules." . . .

In accordance with the provisions of the act a rating bureau was organized known as the Wisconsin Inspection Bureau, and on August 1, 1922, it filed its Rule Book in the office of the commissioner of insurance. The commissioner of insurance proceeded to consider the Rule Book item by item. . . .

The Rule Book contains seventy-three pages. The commissioner considered each proposed rule, form, rider, and privilege and approved or disapproved the same in his discretion. . . .

The general scheme of the law may be stated as follows: Every company writing the designated kind of insurance is required to be a member of a rating bureau. A rating bureau may be formed by any five or more companies and each bureau is required to admit applying companies to membership. Subject to certain supervisory powers of the commissioner, each bureau was charged with the management of its own affairs and was required to be licensed. Rates were to be established by the bureau, and no company could establish a different rate except in the manner provided by the act (§ 203.40). All rates were required to be reasonable. In order to prevent discrimination in rates through difference in contract rights or privileges, a rider which permits an increase of hazard not contemplated in the bureau rate for any risk, is required to be charged for at a rate fixed by the bureau; and no rider affecting the hazard for which no charge is to be made may be used until filed and approved by the commissioner (§ 203.46). To provide a check upon the operations of the various member companies and their agents, a stamping office was provided for. The act recognized the long established practice of insurance companies in the classification of risks and the determination of rates applicable by base rates, and the continuance of these practices was authorized. The commissioner was authorized to review any rate "for the purpose of determining whether the same is unreasonable or discriminatory."

By authorizing the bureau or bureaus, as the case may be, to prepare deviations from the standard policy form and requiring the constituent

companies to use the forms or riders so prepared, or in case of deviation to bring the fact immediately to the attention of the bureau, uniformity of practice was secured as to the members of each bureau. This enabled the commissioner to correct irregularities in practice and required the companies themselves to provide the machinery by which the irregularities were to be disclosed. Any construction of the law must take into account the fact that it was to be applied to the existing conditions which had grown up through long years of practice, which it was the intention or purpose of the state to disturb only so far as it was necessary to secure uniform practice and prevent discrimination in rates and the exaction of unlawful or unreasonable rates. . . .

This brings us to the second and perhaps the most difficult and perplexing question presented by the record. It is argued on behalf of the plaintiffs that if the act be so construed as to confer power upon the commissioner of insurance to disapprove rules and regulations filed with him by a bureau, he can do what he did do in this case, viz., not only disapprove the form filed by the bureau, but indicate what kind of a form he will approve, as already indicated in the instance of the acetylene gas form hereinbefore set out. It is argued, and we think correctly, that if he has this power he has in practical effect the power to prescribe the rules and regulations merely by way of disapproving them until the regulations and rules filed meet his notion of what the rules and regulations should be. It is considered that this is a fair, natural, and reasonable consequence, and that the validity of the statute must be considered and determined as so construed. The validity of the statute so construed is challenged upon two grounds: First, that it constitutes an unlawful delegation of legislative power, second, that, if it is held to be a delegation of legislative power, the statute erects no standard in accordance with which the discretion of the commissioner of insurance is to be exercised and vests in him an arbitrary power.

A determination of the question raised involves a fundamental question of law. If we apply literally the doctrine announced in *Dowling v. Lancashire Ins. Co.* (1896), 92 Wis. 63, 65 N. W. 738, we will arrive at one conclusion. If the doctrine there announced is to be limited or the case in whole or in part overruled, we shall arrive at a different determination.

This has led us to a re-examination of the decisions of this court relating to the delegation of legislative power so called and to a study of the development of administrative law not only in this state but in other jurisdictions.

Writing in 1885, A. V. Dicey said:

"The term *droit administratif* is one for which English legal phraseology supplies no proper equivalent. The words 'administrative law,' which are its most natural rendering, are unknown to English judges

and counsel, and are in themselves hardly intelligible without further explanation.”<sup>9</sup>

Speaking of the effort to establish a strong administrative system in England, he said:

“The attempt ended in failure, partly because of the personal deficiencies of the Stuarts, but chiefly because the whole scheme of administrative law was opposed to those habits of equality before the law which had long been essential characteristics of English institutions.”<sup>10</sup>

Thirty years, however, worked a complete change in Dicey’s notions of administrative law. Writing in 1915, he said:

“The objection to bestowing upon the government of the day, or upon the servants of the crown who come within the control or the influence of the cabinet, functions which in their nature belong to the law courts, is obvious. Such transference of authority saps the foundation of that rule of law which has been for generations a leading feature of the English Constitution. But we must remember that when the state undertakes the management of business properly so called, and business which hitherto has been carried on by each individual citizen simply with a view to his own interest, the government, or, in the language of English law, the servants of the crown, will be found to need that freedom of action necessarily possessed by every private person in the management of his own personal concerns.”<sup>11</sup>

The *Arlidge* case<sup>12</sup> marks a turning point in the history of English law. In that case it was held that judicial power could be delegated to an administrative body; that it might be exercised in accordance with rules made by the administrative body and need not be exercised according to the course of the common law. That case will stand with *Rylands v. Fletcher*, *Hadley v. Baxendale*, and other cases, perhaps not so great intrinsically, but highly significant because they are landmarks in the development of the law. Not only in English-speaking countries but throughout the world where efficient highly organized government is maintained, in recent years governments have undertaken to do many things with which they had not previously attempted to deal,—at least not in the same way. Everywhere this increase in the functions of government had led to the creation of new governmental agencies.

In this country the development of administrative law met an almost insuperable obstacle in the doctrine of the separation of powers. This doctrine announced by Aristotle, expounded by Locke and Montesquieu,

<sup>9</sup> The Law of the Constitution, Dicey, p. 323.

<sup>10</sup> Same, p. 349.

<sup>11</sup> “The Development of the Administrative Law in England,” Dicey, 31 Law Quar. Rev. 148, 150 (1915).

<sup>12</sup> *Local Government Board v. Arlidge*, [1915] A. C. 120, 84 L. J. K. B. 72.

found its most explicit statement in the Constitution of Massachusetts, where it is said:

"In the government of this commonwealth the legislative department shall never exercise the executive and judicial powers or either of them; the executive shall never exercise the legislative and judicial powers or either of them; the judicial shall never exercise the legislative and executive powers or either of them; to the end it may be a government of laws and not of men."

In England and on the Continent the idea of a separation of powers has remained a matter of political theory. In this country it was incorporated into our constitutions—state and national—and became a matter of law.

Beginning with the creation of the Interstate Commerce Commission, which in the beginning was little more than an extra-legislative committee, there has been a development in our law brought about chiefly by the creation of boards, bureaus, and commissions, which has worked and is working a fundamental change. Not only are legislative and judicial powers delegated, but they are exercised in combination, and we not infrequently find powers belonging to the three co-ordinate branches of government combined in a single administrative agency. The change is fundamental because the law, at least in some of its aspects, no longer emanates from the legislature, is no longer wholly declared and enforced by the courts; and to the extent that this is true, we have departed from the fundamental principles upon which our political institutions rest. This has been the cause of much concern and is a source of much diversity of opinion. . . .

If an executive or administrative officer has authority either by himself or acting with other officers to do the very thing that Congress might have done in the exercise of its legislative power, that is, make a rule of conduct for which a citizen may be penalized if he disobeys it, it is difficult to see how it can be said that the power exercised is in one case legislative and in the other case it is not. The regulation made by the administrative officers answers every definition of law. The regulation prescribes a rule of future conduct, compliance with which may be enforced in a court of law. An act of Congress can do no more, and if in the making of the rules, as is held in the Hampton case, *supra* [J. W. Hampton, Jr. & Co. v. United States, 276 U. S. 394, 48 S. Ct. 348 (1928)] the administrative officer may be vested with a discretion as to what the regulation shall be, then the two acts become identical. To call one legislative power and the other a power to make rules and regulations does not change the substance of the power exercised in each case. What it seems to us is demonstrated by the discussion in the Hampton case, where the entire matter is thoroughly reviewed, is that there never was and never can be such a thing in the practical administration of the

law as a complete, absolute, scientific separation of the so-called co-ordinate governmental powers. As a matter of fact they are and always have been overlapping. Courts make rules of procedure which in many instances at least might be prescribed by the legislature. When courts through a receiver reach out and administer a great railway system extending from one ocean to the other, they are not exercising a strictly judicial power,—they are exercising an administrative or executive power, which historically has found its way into the judicial department. The Constitution reserves to the legislature the power to act as a court in certain cases. When it acts as such it exercises a judicial power. Every executive officer in the execution of the law must of necessity interpret it in order to find out what it is he is required to do. While his interpretation is not final, yet in the vast majority of cases it is the only interpretation placed upon it, and as long as it is acquiesced in it becomes the official interpretation which the courts heed and in which they oftentimes acquiesce as a practical construction.

The power of making rates for public utilities is sustained upon the theory that it is a fact-finding operation; that there is one just and reasonable rate, and that it is the duty of the administrative agencies to discover that as a matter of fact, and that therefore in fixing the rate the administrative agency does not do so in the exercise of legislative power although it does the exact thing which the legislature itself might do. If, when the legislature does it, it is an exercise of legislative power, then it must be the exercise of legislative power when the Interstate Commerce Commission does it unless it be true that men gather "thistles from fig trees." As a matter of fact, a rate fixed by a utility commission cannot be disturbed by the courts unless it is so low as to be confiscatory or possibly so high as to be extortionate and oppressive. Manifestly the difference between the lowest rate and the highest rate which the utility commission may lawfully fix is not correctly represented by a line but by a zone. If the commission in the exercise of its discretion fixes a rate within that zone, its determination may not be disturbed. Consequently, there is more than one rate which can be lawfully established by the commission in the exercise of delegated power, and the zone within which the utility commission may operate has exactly the same breadth as that within which the legislature itself might act without judicial interference. In the beginning it was often said that administrative bodies could not be given power to exercise discretion. If that were true, then the activities of an administrative agency would be as circumscribed and inflexible as an act of the legislature. They can be and are in fact endowed with discretionary powers, but the field within which those powers are to be exercised is prescribed.

The essential facts upon which courts, legislatures, and executives, as well as students of the law, agree is that there is an overpowering necessity for a modification of the doctrine of separation and non-delegation

of powers of government. In the face of that necessity courts have upheld laws granting legislative power under the guise of the power to make rules and regulations; have upheld laws delegating judicial power under the guise of power to find facts. As Mr. Root said:

"The old doctrine prohibiting the delegation of legislative power has virtually retired from the field and given up the fight. There will be no withdrawal from these experiments. We shall go on; we shall expand them, whether we approve theoretically or not, because such agencies furnish protection to rights and obstacles to wrong doing which under our new social and industrial conditions cannot be practically accomplished by the old and simple procedure of legislatures and courts as in the last generation."

The public interest would be greatly advanced and our law clarified if the situation as it exists were frankly recognized and an attempt made by all departments of the government to guard against the dangers foreseen by Montesquieu and apprehended by every thoughtful student of the subject. For there can be no doubt that in sustaining laws which combine legislative and judicial power in a single administrative agency, we are on the way back to where we were when the doctrine of the separation of powers was enunciated as a political theory and before it had been wrought into our constitutional system. A refusal to recognize the facts as they exist and to give administrative law its rightful place in our legal theory has prevented a logical and symmetrical development of that law. A legislative act first appears as a bill, is read the first and second time, referred to a committee where it is the subject of a hearing reported back, read a third time and is subject to further debate; if passed it is then considered by the other house, and if concurred in must be approved by the executive. A proposed rule of an administrative body under the present law is not made the subject of a hearing, but may be evolved by the administrative agency without consultation, without debate, and may be announced in the most unexpected way. It should be said that administrative practice at least in this state is far ahead of the requirements of our administrative law in that at least in many instances hearings are held, matters are made subjects of debate by interested parties, and the process by which the rule is formulated in all essential particulars follows that of a bill in the legislature although of course the form of procedure is entirely different. No doubt one reason why hearings have not been required is that the legislature is in constant fear that if a law requires such procedure, that fact will be seized upon as proof of the delegation of a discretionary power and the whole law held unconstitutional. While in the exercise of its fact-finding powers most administrative agencies follow substantially the procedure of courts, they are in many instances not required to do so. There has been a persistent effort to make



their findings conclusive and not subject to review, and no doubt the whole field of administrative law has had an asymmetrical development because of the fact that it had no recognized place in our constitutional theory although it has of necessity been accorded a place in our law. It may well be that the nomenclature of the decisions should be retained and that that kind of legislative power which may be delegated should be called the power to make rules and regulations, and that that kind of judicial power which may be delegated should be called the power to find facts, although the true significance of these terms should be better understood.

In the light of these general observations we shall proceed to an examination of the law of this state. . . .

The subject of what constitutes an unconstitutional delegation of legislative power has been under consideration by this court many times since *Dowling v. Lancashire Ins. Co.*, supra.

In *State ex rel. Buell v. Frear* (1911), 146 Wis. 291, 131 N. W. 832, a law conferring upon the civil service commission certain powers was under consideration, and it was claimed that the power conferred by the act to prescribe and amend rules, put rules into effect, classify offices and places of employment, giving to the commission power to determine what classes shall be subject to examination, make certain exemptions, authorizing the commission to suspend the provision requiring examinations in certain cases, was an unconstitutional delegation of legislative power. Speaking of these provisions the court said:

"No provision of the act, directly or by implication, authorizes any rule to be made that can add to or in any way alter or amend the regulations made by the law. Only such rules are authorized as serve to provide the details for the execution of the provisions of the law in its actual administration, to fix the way in which the requirements of the statute are to be met, and to secure obedience to its mandates."

If this principle had been applied in the *Dowling* case, supra, it must have resulted in a judgment upholding the constitutionality of the standard policy law. In that case a standard was prescribed—the policy form of the state of New York. The adaptation of that form to the needs of Wisconsin was certainly doing no more than to carry out the declared legislative purpose. There could have been no wide departure from the prescribed legislative standard. There are now many laws upon our statute books which confer powers as broad or broader than those conferred upon the civil service commission. . . .

The power which can be exercised by the commissioner of insurance under the provisions of the rating law, compared with the whole volume of power exercised by other administrative agencies in this state, is insignificant. It is manifest that it is the substance of the power delegated rather than the number of acts which may be performed pursuant to it that should determine whether it falls within or without the field of

power which may be delegated. We are unable to discover any substantial difference in the character of the power exercised by the commissioner of insurance in the disapproval of rules and regulations proposed by the bureau and filed by it in his office and the power to prescribe methods by which employers are to make places of employment reasonably safe. While *Dowling v. Lancashire Ins. Co.*, supra, has not in terms been overruled, it has been undermined by subsequent decisions and its foundations removed. Certainly if we are to have any regard for prior decisions or for "common sense and the inherent necessity of governmental co-ordination," we cannot hold the power conferred upon the commissioner of insurance by § 203.36 an unconstitutional delegation of legislative power.

It is considered that the constitutional aspects of administrative law have been so far developed by statute and decision as to indicate in a general way the line which separates that kind of legislative power which may not be delegated from that kind which may be delegated. The power to declare whether or not there shall be a law; to determine the general purpose or policy to be achieved by the law; to fix the limits within which the law shall operate,—is a power which is vested by our constitutions in the legislature and may not be delegated. When, however, the legislature has laid down these fundamentals of a law, it may delegate to administrative agencies the authority to exercise such legislative power as is necessary to carry into effect the general legislative purpose, in the language of CHIEF JUSTICE MARSHALL "to fill up the details"; in the language of CHIEF JUSTICE TAFT "to make public regulations interpreting the statute and directing the details of its execution." It is legislative power of the latter kind which is oftentimes called the rule-making power of boards, bureaus, and commissions.

It only leads to confusion and error to say that the power to fill up the details and promulgate rules and regulations is not legislative power.

So in the instant case the general purpose to be achieved by uniformity of rules and regulations proposed by rate-making bureaus is indicated and the power of the commissioner of insurance is limited to disapproving those which in his judgment would not further the legislative purpose or run counter to it. This power the legislature might properly delegate to the commissioner of insurance. . . .

It is further urged that if the statute be held constitutional as conferring upon the commissioner of insurance the power to disapprove rules and regulations proposed by a rating bureau, it prescribes no standard in accordance with which the commissioner of insurance must act. Considering the nature of the subject matter dealt with, it is quite apparent that any attempt on the part of the legislature to prescribe a standard would result in effect in a prescription of the rules and regulations themselves,—in other words, the subject matter does not admit of the application of any except the most general standards. A Michigan

statute had the following prescribed standards: (1st) fairness and equity between insurer and insured; (2d) brevity and simplicity; (3d) the avoidance of technical words and phrases; (4th) the avoidance of conditions the violation of which by the insured would, without being prejudicial to the insurer, render the policy void or voidable at the option of the insurer; (5th) the use of as large and fair type as is consistent and convenient with the paper or parchment; (6th) placing of each separate condition in paragraphs and the numbering of paragraphs. This law, however, was held unconstitutional.<sup>13</sup>

While the statute does not in terms provide that the commissioner of insurance shall exercise a sound and reasonable discretion in the disapproval of proposed rules and regulations, that condition is necessarily implied. As has been said many times, in many cases administrative officers or bodies must act not only within the field of their statutory powers but in a reasonable and orderly manner. There is nothing in the action of the commissioner of insurance in this case that indicates that he places any other construction upon the act or that he supposes that there is vested in him an arbitrary and uncontrolled power. The rule of reasonableness inheres in every law, and the action of those charged with its enforcement must in the nature of things be subject to the test of reasonableness.

In determining whether or not the power granted by legislative act in a particular case to an administrative agency is of the kind which may be delegated, due regard must be paid to the nature of the subject-matter with which the act deals.<sup>14</sup> The powers conferred upon the Rail-

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<sup>13</sup> King v. Concordia Fire Ins. Co., 140 Mich. 258, 103 N. W. 616 (1905).

<sup>14</sup> Other examples indicate that the courts do quite generally pay "due regard" to the "nature of the subject matter with which the act deals," in deciding whether the standard is sufficiently definite to survive constitutional objections.

Thus, when the New Jersey Legislature adopted a statute authorizing an agency to arbitrate labor disputes involving public utilities, and set up no standard at all to guide the agency, the act was held unconstitutional. *State v. Traffic Telephone Workers' Federation of New Jersey*, 2 N. J. 335, 66 A. (2d) 616 (1949). Thereafter, the Legislature amended the statute, and set up standards directing the agency to consider (a) the public welfare, (b) comparative wages, (c) security of employment, (d) such other factors as are normally taken into consideration. Considering the nature of the subject matter, would it have been practicable to set up more definite standards? The amended statute was upheld in *New Jersey Bell Tel. Co. v. Communications Workers of America*, New Jersey Traffic Division No. 55, CIO, 5 N. J. 354, 75 A. (2d) 721 (1950).

The standard of "excessive profits" was found to be constitutional, as used in a statute empowering an agency to determine and recover excessive profits made by government contractors. *Lichter v. United States*, 334 U. S. 742, 92 L. Ed. 1694, 68 S. Ct. 1294 (1948). Would such a standard be permissible in an income tax statute?

In *Maryland Theatrical Corp. v. Brennan*, 180 Md. 377, 24 A. (2d) 911

road Commission of this state to deal with public utilities are definitely limited, modes of procedure prescribed, and the legislative intent and purpose clearly indicated. The laws of this state conferring upon the Industrial Commission power to make safety orders and the act conferring upon the Railroad Commission power to administer so-called "blue sky laws" are granted in the most general terms, because the nature of the subject matter does not permit of a more precise delimitation. No useful purpose would be achieved, nor would the law in fact have any different meaning or application, if every kind of a place of employment imaginable were specified in the act, and the Industrial Commission authorized to promulgate the necessary rules and regulations to make the places of employment specified safe. It would come to the same thing in the end. It would be practically impossible for the legislature to prescribe definite standards to meet the varying situations which arise in the administration of the securities act. It can only indicate in general terms the legislative policy to be achieved and the methods by which the Railroad Commission is to work out the declared policy. As already indicated, an attempt to specify a standard for rules and regulations to be promulgated by rating bureaus and approved by the commissioner of insurance would be nothing more nor less than the prescribing of the rules and regulations and riders themselves. If this were done by legislative enactment, the flexibility in practice necessary to meet changing conditions in the business world would be destroyed. The general purpose of the law is indicated. The commissioner of insurance must act within the boundaries of reason and not oppressively. Therefore the standard prescribed, considering the subject matter dealt with, meets the test already indicated. . . .

By the court.—The judgment of the Circuit Court is reversed, and the cause is remanded with directions to the Circuit Court to enter judgment affirming so much of the commissioner's order as approves or disapproves the rules and regulations filed by the Bureau. . . .<sup>15</sup>

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(1942), an ordinance provided that a public hall could be rented to private tenants, the rental charge to vary from \$5.00 to \$100.00 a day, in the discretion of an agency. Should a more definite standard be insisted on, to prevent the agency from applying discriminatory standards of rental charges, based on political or personal considerations?

<sup>15</sup> The scope of the Whitman case is discussed in 8 Wis. L. Rev. 176 (1933). The judicial attitude toward the delegation of legislative powers to administrative organs in Wisconsin prior to the Whitman case is thoroughly discussed by Brown in an article entitled "The Executive Departments' Exercise of Quasi-Judicial and Quasi-Legislative Powers in Wisconsin," 3 Wis. L. Rev. 385, 449 (1926).

In *Atlantic Exp. Co. v. Wilmington & W. R. Co.*, 111 N. C. 463, 16 S. E. 393 (1892), the court, in sustaining the constitutionality of an act delegating to the Railroad Commission the power to "make such just and reasonable rules and regulations as may be necessary for preventing" unjust discriminations and preferences, said, quoting with approval from *Georgia Railroad & Banking Co. v. Smith*, 70 Ga. 694 (1883):

**Tighe v. Osborne, Inspector of Buildings, Court of Appeals of Maryland, 1925. 149 Md. 349, 131 Atl. 801.**

[Mandamus proceeding by Mary G. Tighe against Charles H. Osborne, Inspector of Buildings for Baltimore city. From a judgment in favor of respondent, petitioner appeals.]

OFFCUTT, J. The appellant in this case, on May 25, 1925, applied to Charles H. Osborne, Inspector of Buildings of Baltimore city, for a

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"The difference between the power to pass a law and the power to adopt rules and regulations to carry into effect a law already passed is apparent and great; and this we understand to be the distinction recognized strikingly by all courts as the true rule in determining whether or not in such cases a legislative power is granted. The former would be unconstitutional whilst the latter would not."

What is meant by the "power to pass a law" as compared with carrying into effect a law already passed?

See Baltzell, "Statutory Rules and Orders," 6 Ind. L. Jour. 469-501 (1931), who by many illustrative examples seeks to demonstrate that in practice delegation of legislative power in this country is as great as it is in England—and this in spite of our supposed constitutional limitations arising out of separation and distribution of governmental powers.

The extent of delegation of legislative power in England is briefly stated by Cecil T. Carr in a published series of lectures entitled "Delegated Legislation" (1921). Further exposition of English practice is to be found in the "Report of the Committee on Ministers' Powers," 1932, pp. 30-41.

In a number of English Parliamentary enactments of the last fifty years, so-called "Henry VIII clauses" have been inserted. Pursuant to such clauses, the appropriate Ministers are given power to modify the provisions of the acts of Parliament so far as appears to them necessary for the purpose of bringing the acts into operation. This would seem to be almost the ultimate in delegation. The clauses acquired their name from the fact that Henry VIII is popularly regarded as the personification of executive autocracy.

The opinion in the Whitman case (written by Justice Rosenberry in 1928) was not the first criticism of the so-called "true tests" to differentiate between those purely legislative powers which could not be delegated, and the merely *quasi*-legislative powers which could be vested in an administrative agency.

In 1915, Professor (now Justice) Felix Frankfurter declared, in an address at the annual meeting of the American Bar Association, 1 A. B. A. J. 532, 535 (1915): "Another example of change in the point of view of courts is found in their present attitude towards the distribution of governmental functions. The law books continue to repeat as immutable doctrine that there can be no delegation of legislative power, but the Supreme Court sustains the tremendous power given by Congress to the Interstate Commerce Commission. Of course, the form of non-delegation may be preserved by dialectics, but the effect of the court's decisions is to recognize the pressure of economic facts and give the commission substantial control over interstate carriers. Within a decade throughout the country, an increasing variety of administrative commissions with what amounts to legislative power have been created. This means, in effect, the application of technical knowledge, developed by authoritative investigation and fair hearing, to modern complex industrial conditions. The creation of these commissions and the exercise of their power have, broadly speaking, been sustained by the courts as proper instruments for achieving appropriate ends."

Thirty-seven years later, Mr. Justice Jackson, in the course of his dissent in

permit to erect on Cokesbury avenue in that city, a two-story brick building to be used as a stable for 30 horses, and to be constructed in accordance with plans and specifications filed as part of the application which conformed fully with the requirements of the building code of Baltimore city. The inspector of buildings of Baltimore city, however, refused to issue the permit, or to accept the application, for the reason that the applicant had not also complied with the requirements of Ordinance No. 334 of the mayor and city council of Baltimore. The applicant, contending that Ordinance 334 was unconstitutional and void, thereupon filed in the Baltimore city court a petition setting out these facts and praying that court to issue a writ of mandamus directing the inspector of buildings to accept her application and to issue to her a permit to erect the stable. The respondent, the appellee here, answering, admitted the averments of the petition, except those which challenged the validity of the ordinance, and, further answering said:

"That the lot upon which the applicant proposes to erect a stable is situated in a block occupied exclusively for residential purposes, with the exception of the lot at the southeast corner of Cokesbury and Montebello avenues, which said lot is improved by a church, said building being approximately 100 feet from the property of the applicant; that property immediately in the rear of the site of the proposed stable is improved by frame dwelling houses, being separated from the property of the applicant only by a 3-foot alley; that the establishment of a stable at this location would constitute a public nuisance, for the reasons that the danger from fire would be greatly increased by the storage of hay, straw, and feed on the premises, that the residents of the neighborhood would be greatly disturbed in the peaceful enjoyment of their property by the emanation of disagreeable and unhealthy odors, and that the public health would be greatly endangered by the attraction of large numbers of vermin and insects to the location; that Ordinance No. 334 imposes the duty on the defendant to make an investigation of the proposed use, and to refuse the permit if the public health, welfare, or safety would be endangered; that this ordinance is valid and constitutional; and that the applicant is required to conform to the provisions, to wit, the advertising and posting, and the submission to a decision by the defendant as to whether or not the

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Federal Trade Commission v. Ruberoid Co., 343 U. S. 470, 487, 96 L. Ed. 1081, 72 S. Ct. 800 (1952), said: "Courts have differed in assigning a place to these seemingly necessary bodies in our constitutional system. Administrative agencies have been called quasi-legislative, quasi-executive or quasi-judicial, as the occasion required, in order to validate their functions within the separation-of-powers scheme of the Constitution. The mere retreat to the qualifying 'quasi' is implicit with confession that all recognized classifications have broken down, and 'quasi' is a smooth cover which we draw over our confusion as we might use a counterpane to conceal a disordered bed."

permit shall be issued; that, except for Ordinance No. 334, the defendant is without authority to require the petitioner to submit the application for his decision, after investigation, or for the decision of any other municipal officer."

A demurrer to that answer was overruled, and, upon the petitioner's refusal to reply further, the writ was refused, the petition dismissed, and judgment entered in favor of the defendant for costs.

From that decision this appeal, which requires this court to determine the validity of the ordinance in question, was taken.

The purpose of the ordinance, as indicated in its title, is to regulate the use as distinguished from the construction of all buildings in Baltimore city, except those proposed to be used for residential purposes.

Section 2 provides in part:

"That no building or structure shall be erected, nor shall the existing use of land, buildings or structures in the city of Baltimore be changed, unless the owner thereof, or his duly authorized agent, shall first obtain from the zoning commissioner a permit authorizing the erection of such building or structure and such use, or authorizing such change of use. . . . The zoning commissioner shall grant permits applied for under the provisions of this ordinance unless, in his judgment after investigation, the proposed buildings or structures, use, or changes of use would create hazards from fire or disease, or would in any way menace the public welfare, security, health or morals. . . . In case an application is refused, the zoning commissioner shall notify the applicant in writing. Any person aggrieved by any decision, determination or order of the zoning commissioner may appeal within five (5) days to the board of zoning appeals. . . .

"The board of zoning appeals shall hear and decide appeals from any decision, determination or order made by the zoning commissioner. . . . The board of zoning appeals shall not refuse any application involved in an appeal before it, unless, in the judgment of a majority of the members of said board, it appears from satisfactory evidence that the proposed building or structure or use or change of use would create hazards from fire or disease, or would in any way menace the public welfare, security, health or morals. . . .

Section 3 provides:

"That in passing upon applications, the zoning commissioner and the board of zoning appeals shall give consideration to:

"(a) The character and use of buildings and structures adjoining or in the vicinity of the property mentioned in the application.

"(b) The number of persons residing, studying, working in or otherwise occupying buildings adjoining or in the vicinity of the property mentioned in the application.

"(c) The location, kind and size of surface and subsurface structures in the vicinity of the property mentioned in the application, such as water mains, sewers and other utilities.

"(d) Traffic conditions.

"(e) Such other matters and facts as may, in the judgment of the zoning commissioner or the board of zoning appeals, be necessary to determine whether the proposed building or structure or use or change of use would be prejudicial to the public welfare, or adversely affect the public safety, security, health or morals." . . .

The contention of the appellant in effect is that this ordinance confers upon the zoning commissioner and the board of zoning appeals the entire police power of the state with respect to the use of all real property in the city of Baltimore, and commits to their discretion, without adequate restraints, limitations, or standards the power to deprive persons owning real property in that city of the beneficial use thereof without compensation, even where such use in nowise menaces or affects the public order, health, safety, or morals.

The city, on the other hand, contends that it has no such effect, but that it is a proper and constitutional delegation to its agents of the administrative power necessary to accomplish the purpose of the ordinance, which purpose is to protect the public welfare, health, security, and morals in Baltimore city. . . .

The Constitution of Maryland contains these provisions:

"That no man ought to be taken or imprisoned or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or in any manner destroyed, or deprived of his life, liberty or property, but by the judgment of his peers or by the law of the land." Article 23, Bill of Rights.

"The General Assembly shall enact no law authorizing private property to be taken for public use, without just compensation as agreed upon between the parties, or awarded by a jury being first paid or tendered to the party entitled to such compensation." Article 4, § 40, Const. of Md.

And the first question raised by the appeal is whether Ordinance 334 violates any of them. . . .

The ordinance applies to every building and structure now existing, or which may hereafter be constructed, and all land in Baltimore city which is used or proposed to be used for any other than residential purposes.

It confers, first upon the zoning commissioner, and then upon the board of zoning appeals, the right to prevent the erection of any new building or any change in the use of an existing building, structure, or land in the city of Baltimore, where such new building is to be used, or such old use to be changed, to a use which in the opinion of these officials would create hazards "from fire or disease, or would in any



way menace the public welfare, security, health or morals." And in passing upon that question those officials are required to give consideration to the facts and circumstances enumerated in section 3 of the ordinance, which we have noted above. These provisions are supposed to supply adequate rules, regulations, and standards to define, guide, and limit the powers given the zoning officials by section 2 of the ordinance to insure uniformity and certainty in the administration of the law. But in our opinion they have the contrary effect. For, while the protection of the public against the hazards of fire or disease and against anything which could menace the public health, morals, or security may be regarded as equivalent to the "public welfare," that phrase could include matters which would have no tangible or physical relation to those specific objects, and there is nothing in the ordinance to prevent the zoning officials from giving it that broader meaning. If it is given that broader meaning, then it is indeed difficult to define the boundaries of the power granted to those officials or to say with conviction what it could not be extended to embrace, for not only might their conception of what the public welfare demanded lead to one conclusion to-day and another to-morrow, but the interpretation of the phrase might also vary with the changing personnel of the officials administering the law; so that the use of all property would depend, not upon certain and definite laws, uniform in their application, but upon the arbitrary and changing views of individuals. And, whilst it was within the power of the mayor and city counsel to protect the public welfare by adopting legislation forbidding uses which would conflict with it, it was not within its power to delegate to an official or a board the power to do that.

But, doubtful and obscure as that phrase is, as used in section 2, it is made more so by the language of section 3. By subsection (a) of that section the zoning officials, in passing upon applications, are required to consider the character and use of buildings in the vicinity of the property mentioned in the application. In connection with fire hazards, the public security, health, or morals, such considerations would be legitimate and proper, but, in connection with what the officials might consider the public welfare, they could also induce them to refuse a permit for a use which, while not affecting the public order, security, health, or morals, would tend to lower property values in the neighborhood, or for a building which did not conform to the architectural design of other buildings in the vicinity, which would not be valid reasons for refusing it. *Goldman v. Crowther*, supra. (147 Md. 293.) The same comment is also applicable to subsections (b) and (c). By subsection (d), the zoning officials are also required to consider traffic conditions in the vicinity of the property mentioned in the application. That consideration might have a perfectly proper and legitimate relation to the recognized objects of the police power, but it might also,

when used in connection with the phrase "public welfare," be used to justify the refusal of a permit on grounds which would have no legitimate relation to those objects; as, for instance, they might consider that the erection of a large office building or an apartment house in a residential suburban district would inconvenience and annoy that part of the public residing in the neighborhood by increasing the traffic on the adjacent highways. Subsection (e) provides that the zoning officials are also to consider "such other matters and facts as may, in the judgment of the zoning commissioner or the board of zoning appeals, be necessary to determine whether the proposed building or structure or use or change of use would be prejudicial to the public welfare, or adversely affect the public safety, security, health or morals." By that section, after giving consideration to the matters specified in the four preceding sections, the zoning officials are in effect authorized to refuse an application for any matter or fact which in their "judgment," connected with the use, change of use, structure, or building, would be "prejudicial to the public welfare."

It is not easy to frame a broader, more comprehensive, more indefinite, or more unrestricted grant of power than that. Under it, in order to justify the zoning officials in refusing to grant an application, it is not necessary that the proposed use shall in fact be prejudicial to the "public welfare," whatever that may mean, but it is sufficient if in their judgment it will have that effect; because in passing upon the application they must consider "such other matters and facts" as in their "judgment" may be necessary to determine whether the proposed structure, use, or change of use would be prejudicial to the public welfare. And, as they are authorized to consider such matters and facts, they must also be permitted to be influenced by them, for there could be no other reason for their consideration.

Such a grant of power is in our opinion arbitrary and in conflict with both of the constitutional guaranties referred to above, because it commits to the arbitrary discretion of subordinate officials the power of depriving the citizen of his property without compensation by taking from him the beneficial use thereof, regardless of whether such deprivation is required for the protection of the public order, security, health, or morals. . . .

Without further prolonging this opinion, it is sufficient to say that in our judgment Ordinance 334 of the mayor and city council of Baltimore is invalid, because it improperly delegates to the zoning commissioner and the board of zoning appeals of Baltimore city arbitrary, undefined, and unreasonable powers, under which persons owning real property in that city can be deprived of the entire beneficial use thereof without compensation.

It follows, therefore, that the decision appealed from will be reversed, and the case remanded for further proceedings.

Judgment reversed, and case remanded for further proceedings; the appellee to pay the costs.

URNER and PATTISON, JJ., and BOND, C. J., dissent.<sup>16</sup>

**Borgnis v. Falk Co., Supreme Court of Wisconsin, 1911. 147 Wis. 327, 133 N. W. 209.**

[Suit by Edward G. Borgnis and others against the Falk Company, to restrain defendant from electing to come under the Workmen's Compensation Law (Laws 1911, c. 50) during the continuance of complainants' contracts of employment. From a decree in favor of complainants, defendant appeals.]

It appears by the complaint that the defendant is a manufacturing corporation in Milwaukee employing at its shops many workmen, among whom are the plaintiffs; the plaintiff Borgnis is the superintendent of one of the departments in the defendant's establishment at a salary of \$2,000 per year, under a contract extending some time in the future; the plaintiff Schumacher is an infant 17 years of age, employed under an apprenticeship contract which has yet nearly 3 years to run. The complaint further alleges that the defendant threatens to file an election to become subject to the provisions of chapter 50 of the Session Laws of 1911, known as the "Workmen's Compensation Law"; that such election will compel the plaintiffs severally to withdraw from their said contracts or to submit to the provisions of said act; and that hence said election will thus work irreparable injury to the plaintiffs, for which they have no adequate remedy at law. The prayer is that the defendant be enjoined from filing such election during the continuance of the contracts. By answer the defendant admitted the allegations of the complaint, except the allegations of irreparable injury and absence of an adequate remedy at law, which were denied, and as an affirmative defense alleged that the act in question was null and void, because it

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<sup>16</sup> The principal case is annotated and similar cases are discussed in 42 A. L. R. 834 (1926). The Baltimore ordinance was later amended to eliminate subsection (e) and also the references to "public welfare." So amended the ordinance was held valid. *Tighe v. Osborne*, 150 Md. 452, 133 Atl. 465.

Nothing is better settled than the proposition that due process with respect to matters of a justiciable nature does not necessarily mean judicial process. The legislature may without offending against the due process clause confer a certain limited fraction of judicial or "quasi-judicial" power upon administrative tribunals. *Murray's Lessee v. Hoboken Land & Improvement Co.*, 18 How. (U. S.) 272 (1855) (a statute authorized the executive to determine the liability of tax collectors to the treasury); *Reetz v. Michigan*, 188 U. S. 505, 23 S. Ct. 390 (1903) (a statute gave a board of medical registration power to refuse to issue licenses to persons who failed to show proper qualifications).

It does not follow, of course, that there are no limits established by constitutional law upon the power of the legislatures to confer judicial functions upon administrative officers. Two questions arise, first, what kinds of judicial power may be conferred, and, second, what restrictions, if any, must be placed upon the administrative exercise of such judicial powers as can be conferred.

violates a number of specified articles of the Constitutions of the state and of the United States, and hence that the defendant's election to become subject to the act could not possibly work any injury to the plaintiffs. Upon motion, judgment was entered upon the pleadings enjoining the defendant from electing to become subject to the act during the continuance of the plaintiffs' contracts, and the defendant appeals.

WINSLOW, C. J. (after stating the facts as above). We are not certainly advised as to the exact ground on which the decision below was reached, but we assume that it was on the theory that the law in question was a valid law; that it was retrospective in its effect, and that if the defendant elected to become subject to the act the plaintiffs would be compelled to breach their existing contracts or submit to the terms of the act, and thus lose valuable rights; and hence that equity might and should restrain their employer from electing to come under the law until their existing contracts had expired.

It seems to be true that this action might very well be disposed of without considering the question of the validity of the act in question. Ordinarily under such circumstances that course would be the proper one to pursue, for the question of the constitutionality of a statute passed by the Legislature is not one to be lightly taken up, and generally such a question will not be decided unless it be necessary to decide it in order to dispose of the case. There are circumstances here present, however, which seem to call very loudly for immediate consideration of the question of the validity of the act in question, if under any view of the case it can be considered as involved. The Legislature, in response to a public sentiment which cannot be mistaken, has passed a law which attempts to solve certain very pressing problems which have arisen out of the changed industrial conditions of our time. It has endeavored by this law to provide a way by which employer and employed may, if they so choose, escape entirely from that very troublesome and economically absurd luxury known as "personal injury litigation," and resort to a system by which every employee not guilty of wilful misconduct may receive at once a reasonable recompense for injuries accidentally received in his employment under certain fixed rules, without a lawsuit and without friction. . . .

A considerable number of employees have accepted the terms of the act, but unquestionably many are waiting until the question of the constitutionality of the act be authoritatively settled by this court. . . .

Many employers of labor who have not accepted the law have taken that course, not because they have chosen definitely to decline the terms of the law, but because they do not know whether they will be protected if they accept and act under it. Such a condition of uncertainty ought not to be allowed to exist, if it can be removed. This court cannot properly decide questions which are not legitimately involved in bona fide lawsuits, but it may properly decide all questions which are so

involved, even though it be not absolutely essential to the result that all should be decided. The validity of the statute in question is a matter which may be legitimately considered in the decision of this case. If the statute be unconstitutional and void, then it is certain that the plaintiffs have no cause of action, because an election to accept the terms of a void statute could harm no one. . . .

The act is quite long, as the complicated and delicate subject with which it deals manifestly requires, but its general purport and effect so far as this case is concerned may be briefly summarized:

It creates an administrative board to carry its provisions into effect. It divides all private employers of labor into two classes: (1) Those who elect to come under the law; and (2) those who do not so elect. It takes away the defenses of assumption of risk, and negligence of a coemployee from the second class (except that where there are less than four coemployees the latter defense is not disturbed), but leaves both defenses intact to the first class. It prescribes the manner in which an employer may elect to come under its terms, and how an employee may make his election, and when silence on the part of the employee will be considered an election; but it does not in terms compel either employer or employee to submit to its provisions. It then provides a comprehensive scheme by which, after both parties have so elected, any substantial injury, whether the result be fatal or not, received by the employee in the course of or incidental to his employment (except those caused by wilful misconduct) shall be compensated for by the employer according to certain definite rules, which rules are to be administered by the administrative board aforesaid by means of simple procedure definitely laid down, which gives to both parties fair notice and hearing, and results in findings and an award which may be filed in the circuit court and become a judgment. It further provides that the findings of fact shall be conclusive and the award subject to review only by action in the circuit court of Dane county, in which it can be set aside only (1) if the commission acted without or in excess of its powers; (2) if the award was procured by fraud; or (3) if the award is not supported by the findings of fact. It then provides that the judgment thus rendered shall be subject to appeal to the Supreme Court.

For all the essential purposes of this discussion, it may truly be said that this is the law which is before us, and the question is simply whether there is any vital part of it which the Legislature may not enact because the Constitution forbids it. It is matter of common knowledge that this law forms the legislative response to an emphatic, if not a peremptory, public demand. It was admitted by lawyers, as well as laymen, that the personal injury action brought by the employee against his employer to recover damages for injuries sustained by reason of the negligence of the employer had wholly failed to meet or remedy a great economic and social problem which modern industrialism has forced upon us,

namely, the problem of who shall make pecuniary recompense for the toll of suffering and death which that industrialism levies and must continue to levy upon the civilized world. This problem is distinctly a modern problem. In the days of manual labor, the small shop, with few employees, and the stagecoach, there was no such problem, or, if there was, it was almost negligible. Accidents there were in those days, and distressing ones; but they were relatively few, and the employee who exercised any reasonable degree of care was comparatively secure from injury. There was no army of injured and dying, with constantly swelling ranks marching with halting step and dimming eyes to the great hereafter. This is what we have with us now, thanks to the wonderful material progress of our age, and this is what we shall have with us for many a day to come. Legislate as we may in the line of stringent requirements for safety devices or the abolition of employers' common-law defenses, the army of the injured will still increase, and the price of our manufacturing greatness will still have to be paid in human blood and tears. To speak of the common-law personal injury action as a remedy for this problem is to jest with serious subjects, to give a stone to one who asks for bread. The terrible economic waste, the overwhelming temptation to the commission of perjury and the relatively small proportion of the sums recovered which comes to the injured parties in such actions, condemn them as wholly inadequate to meet the difficulty.

In approaching the consideration of the present law, we must bear in mind the well-established principle that it must be sustained, unless it be clear beyond reasonable question that it violates some constitutional limitation or prohibition. That governments founded on written constitutions which are made difficult of amendment or change lose much in flexibility and adaptability to changed conditions there can be no doubt. Indeed that may be said to be one purpose of the written constitution. Doubtless they gain enough in stability and freedom from mere whimsical and sudden changes to more than make up for the loss in flexibility; but the loss still remains, whether for good or ill. A constitution is a very human document, and must embody with greater or less fidelity the spirit of the time of its adoption. It will be framed to meet the problems and difficulties which face the men who make it, and it will generally crystallize with more or less fidelity the political, social, and economic propositions which are considered irrefutable, if not actually inspired, by the philosophers and legislators of the time; but the difficulty is that, while the Constitution is fixed or very hard to change, the conditions and problems surrounding the people, as well as their ideals, are constantly changing. The political or philosophical aphorism of one generation is doubted by the next, and entirely discarded by the third. The race moves forward constantly, and no Canute can stay its progress.

Constitutional commands and prohibitions, either distinctly laid down in express words or necessarily implied from general words, must be obeyed, and implicitly obeyed, so long as they remain unamended or unrepealed. Any other course on the part of either legislator or judge constitutes violation of his oath of office; but when there is no such express command or prohibition, but only general language, or a general policy drawn from the four corners of the instrument, what shall be said about this? By what standards is this general language or general policy to be interpreted and applied to present day people and conditions? When an eighteenth century constitution forms the charter of liberty of a twentieth century government, must its general provisions be construed and interpreted by an eighteenth century mind in the light of eighteenth century conditions and ideals? Clearly not. This were to command the race to halt in its progress, to stretch the state upon a veritable bed of Procrustes.

Where there is no express command or prohibition, but only general language or policy to be considered, the conditions prevailing at the time of its adoption must have their due weight; but the changed social, economic, and governmental conditions and ideals of the time, as well as the problems which the changes have produced, must also logically enter into the consideration, and become influential factors in the settlement of problems of construction and interpretation. These general propositions are here laid down, not because they are considered either new or in serious controversy, but because they are believed to be peculiarly applicable to a case like the present, where a law which is framed to meet new economic conditions and difficulties resulting therefrom is attacked principally because it is believed to offend against constitutional guaranties or prohibitions couched in general terms, or supposed general policies drawn from the whole body of the instrument. . . .

The next important contention is that the law is unconstitutional because it vests judicial power in a body which is not a court and is not composed of men elected by the people, in violation of those clauses of the State Constitution which vest the judicial power in certain courts and provide for the election of judges by the people, as well as in violation of the constitutional guaranties of due process of law. It was suggested at the argument that the Industrial Commission might perhaps be held to be a court of conciliation as authorized to be created by section 16 of article 7 of the State Constitution; but we do not find it necessary to consider or decide this contention. We do not consider the Industrial Commission a court, nor do we construe the act as vesting in the commission judicial powers within the meaning of the Constitution. It is an administrative body or arm of the government, which in the course of its administration of a law is empowered to ascertain some questions of fact and apply the existing law thereto, and in so

doing acts *quasi-judicially*; but it is not thereby vested with judicial power in the constitutional sense.

There are many such administrative bodies or commissions, and with the increasing complexity of modern government they seem likely to increase rather than diminish. Examples may be easily thought of. Town boards, boards of health, boards of review, boards of equalization, railroad rate commissions, and public utility commissions all come within this class. They perform very important duties in our scheme of government, but they are not Legislatures or courts. The legislative branch of the government by statute determines the rights, duties, and liabilities of persons and corporations under certain conditions of fact, and varying as the facts and conditions change. Manifestly the Legislature cannot remain in session and pass a new act upon every change of conditions; but it may and does commit to an administrative board the duty of ascertaining when the facts exist which call into activity certain provisions of the law, and when conditions have changed so as to call into activity other provisions. The law is made by the Legislature; the facts upon which its operation is dependent are ascertained by the administrative board. While acting within the scope of its duty, or its jurisdiction, as it is sometimes called, such a board may lawfully be endowed with very broad powers, and its conclusions may be given great dignity and force, so that courts may not reverse them unless the proof be clear and satisfactory that they are wrong. *M., St. P. & S. S. M. R. Co. v. R. R. Com.*, 136 Wis. 146. Not only this, but many such boards are created whose decisions of fact honestly made within their jurisdiction are not subject to review in any proceeding. *State ex rel. v. Chittenden*, 112 Wis. 569; *State ex rel. v. Wharton*, 117 Wis. 558; *State ex rel. Cook v. Houser*, 122 Wis. 534-561; *State ex rel. v. Trustees*, 138 Wis. 133. It is important to notice the limitation contained in the last sentence. The decision of such a board may be made conclusive when the board is acting within its jurisdiction, not otherwise. Hence the question of its jurisdiction is one always open to the courts for review. It cannot itself conclusively settle that question, and thus endow itself with power. If no appeal from its conclusions be provided, the question whether it has acted within or exceeded its jurisdiction is always open to the examination and decision of the proper court by writ of certiorari. The instances where the question of jurisdiction of such bodies has been examined and decided in certiorari actions are so numerous that it seems unnecessary to cite them. In such cases it is considered that clear violations of law in reaching the result reached by the board, such as acting without evidence when evidence is required, or making a decision contrary to all the evidence, constitute jurisdictional error, and will justify reversal of the board's action, as well as the failure to take the proper steps to acquire jurisdiction at the be-



ginning of the proceeding. State ex rel. Augusta v. Losby, 115 Wis. 57, 67, 90 N. W. 188, 1135.

Thus, in the case before us, the jurisdiction of the Industrial Commission to entertain any claim for compensation under the act rests upon two facts which must exist, viz.: (1) That both employer and employee have elected to come under the act; and (2) that the injury was received in service growing out of or incidental to the employment as the result of accident, and not of willful misconduct.

The Industrial Commission must, of course, decide these questions in any case where they are raised; but it cannot decide them conclusively, for they are jurisdictional questions on which its right to act at all depends. They must be open to review in some court of competent jurisdiction; otherwise, the parties would be denied due process of law. The tribunal only has authority over those who have voluntarily elected to give it authority, and if it can decide finally that a man has given consent, when he has not, it assumes the functions of a court. If the act before us took away from the courts the power to consider these jurisdictional questions, either expressly or by necessary implication, the contention that judicial power had been vested in the commission, contrary to the command of the Constitution, would be of greater force; but we think that the act does not do this, or attempt to do it. True, it says that the findings of fact made by the commission shall, in the absence of fraud be conclusive; but it provides for an action in the circuit court of Dane county in which the board's award may be set aside upon either of three grounds, viz.: (1) That the board acted without or in excess of its powers; (2) that the award was procured by fraud; and (3) that the findings of fact do not support the award.

We regard the expression "without or in excess of its powers" as substantially the equivalent, or at least as inclusive of the expression "without or in excess of its jurisdiction," as those words are used in certiorari actions to review the decisions of administrative officers and bodies. We know of no other construction that can be logically given to them, and it seems to us that they were designedly and advisedly inserted by the framers of the bill to meet the very objection which is now made. With this construction, it is certain that the constitutional powers of the courts have not been invaded, and that no man without his consent can be brought under the law or is deprived of his right to "due process of law" thereby. . . .

The effect of our conclusions upon the result in the present case is yet to be considered. The complaint was sustained, and the injunction granted, on the ground apparently that, the law being valid, the plaintiffs would be greatly injured if their employer elected to become bound by it, because they would be obliged either to break their existing contracts or lose their common-law remedies for their employer's torts. Granting all that plaintiffs claim as to the necessary

results of their employer's election, it is very certain that no irreparable injury results to them. If their employer breaks his contract of employment because they decline to accept the new law, they have adequate legal remedies for the recovery of damages. If, on the other hand, they elect to come under the law themselves, they lose no vested or contract right, and are not damaged in the eyes of the law by the change in their remedies for future torts. In either event there is no cause of action in equity, and no ground for an injunction. The complaint should have been dismissed on the pleadings.

Judgment reversed, and action remanded, with directions to dismiss the complaint.

### A More Modern View

The four preceding cases (Dowling, Wisconsin Inspection Bureau, Tighe, and Borgnis) illustrate the approach which the courts quite generally utilized, 25 to 50 years ago, in judging the validity of delegation of legislative or judicial power to administrative agencies. They serve to put the problem in historical perspective. But they are of more than historical interest, for they illustrate the difficulties which have ever since plagued the courts in determining whether to sustain delegation of legislative or judicial powers to administrative agencies.

In this note, there are summarized a number of other cases, arranged in chronological order, and displaying a great contrariety of result. How are the differences to be explained? Is it a matter of relating the decision to the year when the case was decided, in the light of contemporary economic and political philosophy? Is there a difference between state and federal courts? Is there any logical basis (comparable to the "true test" which the court thought it perceived in the Dowling case) for distinguishing the results? Does it depend on whether the power delegated is legislative or judicial? Or must the decisions be distinguished and explained on a more pragmatic basis, involving such considerations as: (a) tradition in a particular field, (b) substantiality of property interests affected, (c) the need for giving free play to administrative expertise in particular fields, (d) the existence or absence of retained supervisory powers in the legislature or courts (e. g., the availability of broad judicial review)? Does it make a difference whether the standard employed can be related to established legal concepts? Are delegations of power more likely to be upheld where the statute provides for notice and hearing before the administrative agency?

In considering these questions, and others which will occur on reading the following summaries, some assistance may be obtained from Chief Justice Rossman's article "The Spirit of Laws: The Doctrine of Separation of Powers," 35 A. B. A. J. 93 (1949), and Professor Schwartz' "A Decade of Administrative Law: 1942-1951," 51 Mich. L. Rev. 775 (1953), and from the discussions in recent texts mentioned in the bibliography.

Wilson v. Eureka City, 173 U. S. 32, 43 L. Ed. 603, 19 S. Ct. 317 (1899). A municipal ordinance made it unlawful to move buildings on any of the public streets of the city, without first obtaining a permit from the mayor. No standard was provided to guide his discretion. The court upheld the validity of the delegation. Would the result have been the same if the ordinance had applied to driving an automobile through the streets of the city? Or if the ordinance had applied to conducting a mass meeting in the public parks?

Matthews v. Murphy, 23 Ky. L. Rep. 750, 63 S. W. 785 (1901). A statute authorized the state board of health to revoke the license of a physician found guilty of "grossly unprofessional conduct of a character likely to deceive or defraud the public . . ." Did the quoted words provide a sufficient standard? The court ruled they did not, because a doctor might not know what would be considered "unprofessional conduct," and for the further reason that as the personnel of the board of health changed, there might be different applications of the standard. Most other courts have reached a contrary result. See 5 A. L. R. 94.

State v. Sherow, 87 Kan. 235, 123 Pac. 866 (1912). Township boards were authorized by statute to grant licenses for the operation of pool halls, "whenever in their judgment it shall be to the interest of their respective townships to grant the same." Operating a pool hall without such a license was made a criminal offense. The court was asked to set aside a conviction under the statute on the basis that the standard was so vague as to amount to a delegation of legislative and judicial power to the township boards. The court upheld the statute, because of the character of the business, and pointed out that the result would have been different if the statute had applied to "some useful trade or business, like keeping a pharmacy."

State ex rel. Makris v. Superior Court of Pierce County, 113 Wash. 296, 193 Pac. 845 (1920). A municipal ordinance authorized the commissioner of public safety to revoke a license to operate a soft drink and candy store, on any of three grounds: (1) disorderly or immoral conduct, (2) gambling on the premises, (3) "whenever the preservation of public morality, health, peace or good order shall in his judgment render such revocation necessary." The court enjoined the commissioner from proceeding to revoke a license on the third of the above grounds, holding the standard so vague as to amount to an unlawful delegation of judicial power.

City of Shreveport v. Herndon, 159 La. 113, 105 So. 244 (1925). Another commissioner of public safety came to grief. An ordinance empowered him to adopt rules and regulations to control parking on public streets. Pursuant thereto, he adopted rules limiting the length of time that a vehicle could be parked. Mr. Herndon was ticketed for over-parking. This so angered him that, instead of paying the nominal fine and forgetting the matter, he took the case to the state supreme court,

which upheld his contention that the ordinance was invalid, in attempting to delegate legislative power to the commissioner without prescribing a standard to guide his action. The court suggested that such delegation might be permitted in cases "where it is impracticable to lay down a definite or comprehensive rule"; but found that here it would have been practicable (and hence was constitutionally necessary) to have prescribed a definite rule to limit the commissioner's discretion. What guide would you suggest?

*A. L. A. Schechter Poultry Corp. v. United States*, 295 U. S. 495, 79 L. Ed. 1570, 55 S. Ct. 837 (1935). The National Industrial Recovery Act, one of the earliest of the New Deal anti-depression measures, declared a general public policy of rehabilitating industry and conserving natural resources. To achieve these ends, the statute provided that trade associations could promulgate codes of "fair competition," which upon approval by the President would have the force of law. Three standards were set up to guide the President in approving or disapproving such proposed codes. He was authorized to approve a code only if he found: (1) that the trade association proposing the code was representative of the industry; (2) that the code was not designed to promote monopolies; (3) that the code would carry out the general policies of the Act. A group proposed a "poultry code" which provided, among other things, that poultry dealers must not permit customers to select the particular chickens they wanted, but must require the customer to take the chickens which the merchant selected. The code was duly approved, and when the Schechters refused to comply with it, they were convicted and faced stiff penalties. The Supreme Court held the proceedings unconstitutional, saying "Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested." If Congress duly performs its responsibility of "laying down policies and establishing standards," the court further ruled, it may leave "to selected instrumentalities the making of subordinate rules within prescribed limits"; but here the statute "supplies no standards." Justice Cardozo, concurring, described it as "delegation running riot." The court mentioned three times that the statute did not provide any method of permitting interested parties to make their views known before the code was adopted. Do you think this had anything to do with the result? Reference was also made to the fact that there was no provision for judicial review of the reasonableness of the code provisions. Does this circumstance possess any significance? The case is noteworthy as being one of the few instances in which the Supreme Court has held a statute of broad application and far-reaching significance to be void, as illegally delegating legislative powers.

*National Broadcasting Co. v. United States*, 319 U. S. 190, 87 L. Ed. 1344, 63 S. Ct. 997 (1943). In sustaining the wide authority vested in the Federal Communications Commission to regulate radio

broadcasting, against an attack that legislative powers had been invalidly delegated, the court observed:

"The Commission was, however, not left at large in performing this duty. The touchstone provided by Congress was the 'public interest, convenience or necessity,' a criterion which 'is as concrete as the complicated factors for judgment in such a field of delegated authority permit.' . . . While Congress did not give the Commission unfettered discretion to regulate all phases of the radio industry, it did not frustrate the purposes for which the Communications Act of 1934 was brought into being by attempting an itemized catalogue of the specific manifestations of the general problems for the solution of which it was establishing a regulatory agency. That would have stereotyped the powers of the Commission to specific details in regulating a field of enterprise the dominant characteristic of which was the rapid pace of its unfolding."

*Yakus v. United States*, 321 U. S. 414, 88 L. Ed. 834, 64 S. Ct. 660 (1944). The Emergency Price Control Act of 1942 authorized the Price Administrator to establish "such maximum price or prices as in his judgment will be generally fair and equitable and will effectuate the purposes" of the Act, if in his judgment commodity prices rose or threatened to rise "to an extent or in a manner inconsistent with the purpose" of the Act (which was stated as follows: "to stabilize prices and to prevent speculative, unwarranted and abnormal increases in prices and rents"). It was further stipulated that "so far as practicable in establishing any maximum price the administrator shall ascertain and give due consideration to the prices prevailing between October 1 and October 15, 1941 . . . and shall make adjustments for such relevant factors as he may determine and deem to be of general applicability, including . . . speculative fluctuations, general increases or decreases in cost of production, distribution and transportation, and general increases or decreases in profits." The court held that these standards were "sufficiently definite and precise to enable Congress, the courts and the public to ascertain whether the Administrator, in fixing the designated prices, has conformed to those standards. . . . [and] we are unable to find in them an unauthorized delegation of legislative power."

*American Power & Light Co. v. Securities & Exchange Commission*, 329 U. S. 90, 91 L. Ed. 103, 67 S. Ct. 133 (1946). The court rejected the claim that there was an unconstitutional delegation of power to the Securities & Exchange Commission under the Public Utility Holding Company Act of 1935, 49 Stat. 803 (15 U. S. C., Sec. 79 (k)). The statute provided that the Commission should so act as to insure that the continued existence of any holding company did not "unduly or unnecessarily complicate the structure" or "unfairly or inequitably distribute voting power among security holders . . ." In answer to the argument that these phrases were undefined by the statute and were legally meaningless in themselves and did not set up any sufficient standard,

the court said that in the first place these standards "cannot be said to be utterly without meaning, especially to those familiar with corporate realities." The court also said that they derived meaning from the purpose of the Act, as stated in the Act's recital of the evils to be corrected and the general policy to be attained. The court also said: "The judicial approval accorded these 'broad' standards for administrative action is a reflection of the necessities of modern legislation dealing with complex economic and social problems."

*Joseph Burstyn, Inc. v. Wilson*, 343 U. S. 495, 96 L. Ed. 1098, 72 S. Ct. 777 (1952). A New York statute authorized the State Commissioner of Education to ban the showing of motion pictures found to be "sacrilegious." Holding this invalid, the court declared: "In seeking to apply the broad and all-inclusive definition of 'sacrilegious' given by the New York courts, the censor is set adrift upon a boundless sea amid a myriad of conflicting currents of religious views, with no charts but those provided by the most vocal and powerful orthodoxies. New York cannot vest such unlimited restraining control over motion pictures in a censor." Does this case turn on separation of powers philosophies, or on grounds of undue interference with constitutional guarantees of religious freedom and freedom of speech? <sup>17</sup>

## SECTION 5. EXECUTIVE CONTROLS

**Humphrey's Executor v. United States**, Supreme Court of the United States, 1935. 295 U. S. 602, 79 L. Ed. 1611, 55 S. Ct. 869.

MR. JUSTICE SUTHERLAND delivered the opinion of the court.

Plaintiff brought suit in the Court of Claims against the United States to recover a sum of money alleged to be due the deceased for salary as a Federal Trade Commissioner from October 8, 1933, when the President undertook to remove him from office, to the time of his death on February 14, 1934. The court below has certified to this court two questions (Act of February 13, 1925, § 3(a), c. 229, 43 Stat. 936, 939; 28 USCA § 288), in respect of the power of the President to make the removal. The material facts which give rise to the questions are as follows:

William E. Humphrey, the decedent, on December 10, 1931, was nominated by President Hoover to succeed himself as a member of the Federal Trade Commission, and was confirmed by the United States Senate. He was duly commissioned for a term of seven years expiring September 25, 1938; and, after taking the required oath of office, entered upon his duties. On July 25, 1933, President Roosevelt addressed a

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<sup>17</sup> See Parker, "Separation of Powers Revisited," 49 Mich. L. Rev. 1009 (1951).

letter to the commissioner asking for his resignation, on the ground "that the aims and purposes of the Administration with respect to the work of the Commission can be carried out most effectively with personnel of my own selection," but disclaiming any reflection upon the commissioner personally or upon his services. The commissioner replied, asking time to consult his friends. After some further correspondence upon the subject, the President on August 31, 1933, wrote the commissioner expressing the hope that the resignation would be forthcoming and saying:

"You will, I know, realize that I do not feel that your mind and my mind go along together on either the policies or the administering of the Federal Trade Commission, and, frankly, I think it is best for the people of this country that I should have a full confidence."

The commissioner declined to resign; and on October 7, 1933, the President wrote him:

"Effective as of this date you are hereby removed from the office of Commissioner of the Federal Trade Commission."

Humphrey never acquiesced in this action, but continued thereafter to insist that he was still a member of the commission, entitled to perform its duties and receive the compensation provided by law at the rate of \$10,000 per annum. Upon these and other facts set forth in the certificate, which we deem it unnecessary to recite, the following questions are certified:

"1. Do the provisions of section 1 of the Federal Trade Commission Act, stating that 'any commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office,' restrict or limit the power of the President to remove a commissioner except upon one or more of the causes named?

"If the foregoing question is answered in the affirmative, then—

"2. If the power of the President to remove a commissioner is restricted or limited as shown by the foregoing interrogatory and the answer made thereto, is such a restriction or limitation valid under the Constitution of the United States?"

The Federal Trade Commission Act, c. 311, 38 Stat. 717; 15 USCA §§ 41, 42, creates a commission of five members to be appointed by the President by and with the advice and consent of the Senate, and § 1 provides:

"Not more than three of the commissioners shall be members of the same political party. The first commissioners appointed shall continue in office for terms of three, four, five, six, and seven years, respectively, from the date of the taking effect of this Act, the term of each to be designated by the President, but their successors shall be appointed for terms of seven years, except that any person chosen to fill a vacancy shall be appointed only for the unexpired term of the commissioner

whom he shall succeed. The commission shall choose a chairman from its own membership. No commissioner shall engage in any other business, vocation, or employment. Any commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office.  
..."

Section 5 of the act in part provides:

"That unfair methods of competition in commerce are hereby declared unlawful.

"The commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, and common carriers subject to the Acts to regulate commerce, from using unfair methods of competition in commerce."

In exercising this power, the commission must issue a complaint stating its charges and giving notice of hearing upon a day to be fixed. A person, partnership, or corporation proceeded against is given the right to appear at the time and place fixed and show cause why an order to cease and desist should not be issued. There is provision for intervention by others interested. If the commission finds the method of competition is one prohibited by the act, it is directed to make a report in writing stating its findings as to the facts, and to issue and cause to be served a cease and desist order. If the order is disobeyed, the commission may apply to the appropriate circuit court of appeals for its enforcement. The party subject to the order may seek and obtain a review in the circuit court of appeals in a manner provided by the act.

Section 6, among other things, gives the commission wide powers of investigation in respect of certain corporations subject to the act, and in respect of other matters, upon which it must report to Congress with recommendations. Many such investigations have been made, and some have served as the basis of congressional legislation.

Section 7 provides:

"That in any suit in equity brought by or under the direction of the Attorney General as provided in the anti-trust acts, the court may, upon the conclusion of the testimony therein, if it shall be then of opinion that the complainant is entitled to relief, refer said suit to the commission, as a master in chancery, to ascertain and report an appropriate form of decree therein. The commission shall proceed upon such notice to the parties and under such rules of procedure as the court may prescribe, and upon the coming in of such report such exceptions may be filed and such proceedings had in relation thereto as upon the report of a master in other equity causes, but the court may adopt or reject such report, in whole or in part, and enter such decree as the nature of the case may in its judgment require."

First. The question first to be considered is whether, by the provisions of § 1 of the Federal Trade Commission Act already quoted,



the President's power is limited to removal for the specific causes enumerated therein. The negative contention of the government is based principally upon the decision of this court in *Shurtleff v. United States*, 189 U. S. 311. That case involved the power of the President to remove a general appraiser of merchandise appointed under the Act of June 10, 1890, 26 Stat. 131. Section 12 of the act provided for the appointment by the President, by and with the advice and consent of the Senate, of the nine general appraisers of merchandise who "may be removed from office at any time by the President for inefficiency, neglect of duty or malfeasance in office." The President removed Shurtleff without assigning any cause therefor. The Court of Claims dismissed plaintiff's petition to recover salary, upholding the President's power to remove for causes other than those stated. In this court Shurtleff relied upon the maxim *expressio unius est exclusio alterius*; but this court held that, while the rule expressed in the maxim was a very proper one and founded upon justifiable reasoning in many instances, it "should not be accorded controlling weight when to do so would involve the alteration of the universal practice of the government for over a century and the consequent curtailment of the powers of the executive in such an unusual manner." What the court meant by this expression appears from a reading of the opinion. That opinion—after saying that no term of office was fixed by the act and that, with the exception of judicial officers provided for by the Constitution, no civil officer had ever held office by life tenure since the foundation of the government—points out that to construe the statute as contended for by Shurtleff would give the appraiser the right to hold office during his life or until found guilty of some act specified in the statute, the result of which would be a complete revolution in respect of the general tenure of office, effected by implication with regard to that particular office only.

"We think it quite inadmissible," the court said (pp. 316, 318), "to attribute an intention on the part of Congress to make such an extraordinary change in the usual rule governing the tenure of office, and one which is to be applied to this particular office only, without stating such intention in plain and explicit language, instead of leaving it to be implied from doubtful inferences. . . . We cannot bring ourselves to the belief that Congress ever intended this result while omitting to use language which would put that intention beyond doubt."

These circumstances, which led the court to reject the maxim as inapplicable, are exceptional. In the face of the unbroken precedent against life tenure, except in the case of the judiciary, the conclusion that Congress intended that, from among all other civil officers, appraisers alone should be selected to hold office for life was so extreme

as to forbid, in the opinion of the court, any ruling which would produce that result if it reasonably could be avoided. The situation here presented is plainly and wholly different. The statute fixes a term of office, in accordance with many precedents. The first commissioners appointed are to continue in office for terms of three, four, five, six, and seven years respectively; and their successors are to be appointed for terms of seven years—any commissioner being subject to removal by the President for inefficiency, neglect of duty, or malfeasance in office. The words of the act are definite and unambiguous.

The government says the phrase "continue in office" is of no legal significance and, moreover, applies only to the first commissioners. We think it has significance. It may be that, literally, its application is restricted as suggested; but it, nevertheless, lends support to a view contrary to that of the government as to the meaning of the entire requirement in respect of tenure; for it is not easy to suppose that Congress intended to secure the first commissioners against removal except for the causes specified and deny like security to their successors. Putting this phrase aside, however, the fixing of a definite term subject to removal for cause, unless there be some countervailing provision or circumstance indicating the contrary, which here we are unable to find, is enough to establish the legislative intent that the term is not to be curtailed in the absence of such cause. But if the intention of Congress that no removal should be made during the specified term except for one or more of the enumerated causes were not clear upon the face of the statute, as we think it is, it would be made clear by a consideration of the character of the commission and the legislative history which accompanied and preceded the passage of the act.

The commission is to be non-partisan; and it must, from the very nature of its duties, act with entire impartiality. It is charged with the enforcement of no policy except the policy of the law. Its duties are neither political nor executive, but predominantly *quasi-judicial* and *quasi-legislative*. Like the Interstate Commerce Commission, its members are called upon to exercise the trained judgment of a body of experts "appointed by law and informed by experience." *Illinois Central R. Co. v. Interstate Commerce Comm'n*, 206 U. S. 441, 454; *Standard Oil Co. v. United States*, 283 U. S. 235, 238, 239.

The legislative reports in both houses of Congress clearly reflect the view that a fixed term was necessary to the effective and fair administration of the law. In the report to the Senate (No. 597, 63d Cong., 2d Sess., pp. 10, 11) the Senate Committee on Interstate Commerce, in support of the bill which afterwards became the act in question, after referring to the provision fixing the term of office at seven years, so arranged that the membership would not be subject to complete change at any one time, said:

"The work of this commission will be of a most exacting and difficult character, demanding persons who have experience in the problems to be met—that is, a proper knowledge of both the public requirements and the practical affairs of industry. It is manifestly desirable that the terms of the commissioners shall be long enough to give them an opportunity to acquire the expertness in dealing with these special questions concerning industry that comes from experience."

The report declares that one advantage which the commission possessed over the Bureau of Corporations (an executive subdivision in the Department of Commerce which was abolished by the act) lay in the fact of its independence, and that it was essential that the commission should not be open to the suspicion of partisan direction. The report quotes (p. 22) a statement to the committee by Senator Newlands, who reported the bill, that the tribunal should be of high character and "independent of any department of the government . . . a board or commission of dignity, permanence, and ability, independent of executive authority, except in its selection, and independent in character."

The debates in both houses demonstrate that the prevailing view was that the commission was not to be "subject to anybody in the government but . . . only to the people of the United States"; free from "political domination or control" or the "probability or possibility of such a thing"; to be "separate and apart from any existing department of the government—not subject to the orders of the President."

More to the same effect appears in the debates which were long and thorough and contain nothing to the contrary. While the general rule precludes the use of these debates to explain the meaning of the words of the statute, they may be considered as reflecting light upon its general purposes and the evils which it sought to remedy. *Federal Trade Com. v. Raladam Co.*, 283 U. S. 643, 650.

Thus, the language of the act, the legislative reports, and the general purposes of the legislation as reflected by the debates, all combine to demonstrate the Congressional intent to create a body of experts who shall gain experience by length of service—a body which shall be independent of executive authority, except in its selection, and free to exercise its judgment without the leave or hindrance of any other official or any department of the government. To the accomplishment of these purposes it is clear that Congress was of opinion that length and certainty of tenure would vitally contribute. And to hold that, nevertheless, the members of the commission continue in office at the mere will of the President, might be to thwart, in large measure the very ends which Congress sought to realize by definitely fixing the term of office.

We conclude that the intent of the act is to limit the executive power of removal to the causes enumerated, the existence of none of which is claimed here; and we pass to the second question.

Second. To support its contention that the removal provision of § 1, as we have just construed it, is an unconstitutional interference with the executive power of the President, the government's chief reliance is *Myers v. United States*, 272 U. S. 52. That case has been so recently decided, and the prevailing and dissenting opinions so fully review the general subject of the power of executive removal, that further discussion would add little of value to the wealth of material there collected. These opinions examine at length the historical, legislative and judicial data bearing upon the question, beginning with what is called "the decision of 1789" in the first Congress and coming down almost to the day when the opinions were delivered. They occupy 243 pages of the volume in which they are printed. Nevertheless, the narrow point actually decided was only that the President had power to remove a postmaster of the first class, without the advice and consent of the Senate as required by act of Congress. In the course of the opinion of the court, expressions occur which tend to sustain the government's contention, but these are beyond the point involved and, therefore, do not come within the rule of *stare decisis*. In so far as they are out of harmony with the views here set forth these expressions are disapproved. . . .

The office of a postmaster is so essentially unlike the office now involved, that the decision in the *Myers* case cannot be accepted as controlling our decision here. A postmaster is an executive officer restricted to the performance of executive functions. He is charged with no duty at all related to either the legislative or judicial power. The actual decision in the *Myers* case finds support in the theory that such an officer is merely one of the units in the executive department and, hence, inherently subject to the exclusive and illimitable power of removal by the Chief Executive, whose subordinate and aid he is. Putting aside dicta, which may be followed if sufficiently persuasive but which are not controlling, the necessary reach of the decision goes far enough to include all purely executive officers. It goes no farther;—much less does it include an officer who occupies no place in the executive department and who exercises no part of the executive power vested by the Constitution in the President.

The Federal Trade Commission is an administrative body created by Congress to carry into effect legislative policies embodied in the statute in accordance with the legislative standard therein prescribed, and to perform other specified duties as a legislative or as a judicial aid. Such a body cannot in any proper sense be characterized as an arm or an eye of the executive. Its duties are performed without executive leave and, in the contemplation of the statute, must be free from executive control. In administering the provisions of the statute in respect of "unfair methods of competition"—that is to say in filling in and administering the details embodied by that general standard—the com-

mission acts in part *quasi*-legislatively and in part *quasi*-judicially. In making investigations and reports thereon for the information of Congress under § 6, in aid of the legislative power, it acts as a legislative agency. Under § 7, which authorizes the commission to act as a master in chancery under rules prescribed by the court, it acts as an agency of the judiciary. To the extent that it exercises any executive function—as distinguished from executive power in the constitutional sense—it does so in the discharge and effectuation of its *quasi*-legislative or *quasi*-judicial powers, or as an agency of the legislative or judicial departments of the government.

If Congress is without authority to prescribe causes for removal of members of the trade commission and limit executive power of removal accordingly, that power at once becomes practically all-inclusive in respect of civil officers with the exception of the judiciary provided for by the Constitution. The Solicitor General, at the bar, apparently recognizing this to be true, with commendable candor, agreed that his view in respect of the removability of members of the Federal Trade Commission necessitated a like view in respect of the Interstate Commerce Commission and the Court of Claims. We are thus confronted with the serious question whether not only the members of these *quasi*-legislative and *quasi*-judicial bodies, but the judges of the legislative Court of Claims, exercising judicial power (*Williams v. United States*, 289 U. S. 553, 565–567), continue in office only at the pleasure of the President.

We think it plain under the Constitution that illimitable power of removal is not possessed by the President in respect of officers of the character of those just named. The authority of Congress, in creating *quasi*-legislative or *quasi*-judicial agencies, to require them to act in discharge of their duties independently of executive control cannot well be doubted; and that authority includes, as an appropriate incident, power to fix the period during which they shall continue in office, and to forbid their removal except for cause in the meantime. For it is quite evident that one who holds his office only during the pleasure of another, cannot be depended upon to maintain an attitude of independence against the latter's will.

The fundamental necessity of maintaining each of the three general departments of government entirely free from the control or coercive influence, direct or indirect, of either of the others, has often been stressed and is hardly open to serious question. So much is implied in the very fact of the separation of the powers of these departments by the Constitution, and in the rule which recognizes their essential co-equality. The sound application of a principle that makes one master in his own house precludes him from imposing his control in the house of another who is master there. James Wilson, one of the framers of the Constitution and a former justice of this court, said that the independ-

ence of each department required that its proceedings "should be free from the remotest influence, direct or indirect, of either of the other two powers." Andrews, "The Works of James Wilson," 1896, vol. 1, p. 367. And Mr. Justice Story in the first volume of his work on the Constitution, 4th Ed., § 530, citing No. 48 of the Federalist, said that neither of the departments in reference to each other "ought to possess, directly or indirectly, an overruling influence in the administration of their respective powers." And see *O'Donoghue v. United States*, 289 U. S. 516, at pp. 530, 531.

The power of removal here claimed for the President falls within this principle, since its coercive influence threatens the independence of a commission which is not only wholly disconnected from the executive department, but which, as already fully appears, was created by Congress as a means of carrying into operation legislative and judicial powers, and as an agency of the legislative and judicial departments.

The result of what we now have said is this: Whether the power of the President to remove an officer shall prevail over the authority of Congress to condition the power by fixing a definite term and precluding a removal except for cause will depend upon the character of the office; the Myers decision, affirming the power of the President alone to make the removal, is confined to purely executive officers; and as to officers of the kind here under consideration, we hold that no removal can be made during the prescribed term for which the officer is appointed, except for one or more of the causes named in the applicable statute.

To the extent that, between the decision in the Myers case, which sustains the unrestrictable power of the President to remove purely executive officers, and our present decision that such power does not extend to an office such as that here involved, there shall remain a field of doubt, we leave such cases as may fall within it for future consideration and determination as they may arise.

In accordance with the foregoing, the questions submitted are answered. Question No. 1, Yes. Question No. 2, Yes.<sup>18</sup>

### Indirect Controls

Proposals to provide some means of supervisory control over administrative processes are based on the premise that broad grants of discretionary power to administrative agencies are subject to possible abuse. If this premise be accepted, it would appear that some sort of

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<sup>18</sup> For a detailed consideration of the application of the Humphrey and Myers cases to various federal administrative tribunals, see Donovan and Irvine, "The President's Power to Remove Members of Administrative Agencies," 21 *Corn. L. Q.* 215 (1936). Also see "A Problem in the Personnel of the Federal Corporation," 20 *St. Louis L. Rev.* 229 (1935) and "Removal of Federal Administrative Officers," 30 *Ill. L. Rev.* 1037 (1936).

supervisory control is desirable to prevent, or at least to correct, any instances of such abuse of delegated power.

How such control should be exercised is a knotty problem. It has long been the subject of study, in England as well as in this country. In 1929, the Rt. Hon. Lord Hewart of Bury, Lord Chief Justice of England, published a book entitled "The New Despotism," a scathing denunciation of "bureaucracy" as it had developed in England. In particular, he criticized the extent to which legislative and judicial power had been delegated by Parliament to administrative officials, characterizing the trend as one of "administrative lawlessness," for the reason that all too often the administrative officials were completely beyond reach of any established regulations, principles or courses of procedure.

Shortly after the publication of the book, a Committee on Ministers' Powers was appointed by the Rt. Hon. Viscount Sankey, Lord High Chancellor, and requested to report as to the safeguards deemed desirable or necessary to secure constitutional principles and the supremacy of the law. After three years of study, this Committee issued a long series of recommendations, including the following principal suggestions: (1) all delegations should be accompanied by a clear definition of the limits of the powers conferred; (2) except in cases of gravest need, powers to legislate on matters of principle or policy should never be delegated; (3) complete information as to the contents of administrative rules should be made publicly available; (4) in making rules, administrative agencies should consult with the particular private interests that would be especially affected; (5) all administrative rules should be brought before Parliament for review; (6) administrative action should be preceded by notice to and hearing of the parties affected by such action.

These recommendations are of particular interest because of the remarkably close parallelism they bear to the conclusions reached some ten years later in the United States, as a result of the work of the Attorney General's Committee on Administrative Procedure.

It will be noted that in both the British and American reports, there is implicit recognition that the problem cannot be solved by placing a general supervisory control in the legislature, or the courts, or the chief executive officer of the government. [Quaere: So far as the United States is concerned, would the constitutional provisions that led the court in *Humphrey's Executor* to invalidate an attempt by the executive to assert such powers of supervisory control make it also impossible to vest such powers in the legislature or the courts? If not, are there practical objections to asking the legislature or the courts to assume such powers?] Both reports reach the general conclusion that the best method of achieving control is by indirection—more specifically, by setting up codes of fair administrative procedure (as contemplated by the six points of the British Report, *supra*, and by the suggested code of procedural



powers and standards suggested by the three dissenting members of the Attorney General's Committee, which became the basis of a major portion of the Federal Administrative Procedure Act of 1946). The theory of such codes of administrative procedure is that it is possible to avoid most dangers of abuse of administrative power (and in any event, to afford remedies for correcting any that may occur) by setting up proper requirements to assure: (1) that all interested parties will have due notice of contemplated administrative action; (2) that an opportunity to be heard will also be made available; (3) that administrative decisions will represent unbiased determinations made on the basis of the facts of the individual case, by qualified individuals who have through study of the testimony acquired personal knowledge of such facts; (4) that there will be an expeditious method for appealing significant questions of law to the designated courts.

Such administrative codes, it may be noted, are based on the theory that administrative agencies should be recognized as independent instrumentalities of justice. They are no longer to be classed as subordinate, inferior organizations. Efforts to improve the caliber of their performance should recognize the practical problems encountered, and provide realistic solutions to these problems.

## **SECTION 6. PRESCRIBED STANDARDS OF ADMINISTRATIVE PROCEDURE AS A MEANS OF CONTROLLING ADMINISTRATIVE DISCRETION**

### **Excerpts from the Minority Opinion in the Final Report of the Attorney General's Committee, Pages 214-216**

[Reference has hitherto been made to the final report of the Attorney General's Committee on Administrative Procedure. In connection with that report a minority of the committee presented certain additional views and recommendations. They appended to their statement a proposed administrative code of procedural powers and standards, believing that the adoption of such a code would serve to channel administrative powers and thereby aid not only the persons affected by administrative authority but also the administrative agencies themselves. The minority urged the sponsoring and adoption of such a code. In support of its views the minority offered the following statement of reasons and objectives.]

In some quarters there is a fear of unduly hampering the freedom of action of administrative agencies, and a conviction that it is either impossible or unwise to provide by legislation for the great variety of administrative subjects and processes. The answer, we think, is to identify the few basic considerations and express them in legislative statements of policy, of principles, or of standards for the guidance of administrators, subject always to reasonable variation to meet varying



needs. Modern legislation, by which the most intimate and vital interests of society are governed, is cast for the most part in similar terms. To say that man can be so governed, but that the agents of the state cannot or should not be so governed, is a recognition of rejected forms of government. To govern the courts by weighty tradition, a bulky "Judicial Code," and uniform rules of practice but to give administrators only slight statutory attention is at least questionable in a democracy.

Administrative agencies are peculiarly sensitive to procedural and substantive provisions of statute, however general their terms—far more than to the statements of courts. Where controversy is stirred over a specific agency, we have only to look to the legislation under which it acts. If Congress has given constant attention, as it has to the Interstate Commerce Commission, a better result has been achieved. Without impairing government, a legislative statement of principles will go far toward dispelling the cloud that hovers over the administrative process. It will guide administrators and protect the citizen far more than the judicial review of particular administrative cases, which is available only to those few who can afford it. What is needed is not a detailed code but a set of principles and a statement of legislative policy. The prescribed pattern need not be, and should not be, a rigid mold. There should be ample room for necessary changes and full allowance for differing needs of different agencies.

Such a statement would be of invaluable assistance to the private persons on whom powers of government impinge, for they could learn more readily and clearly when, where, and how to proceed. Greater cooperation with government officials would be assured. It would be of inestimable value to government itself by helping to alleviate the disrespect, distrust, and fear now felt by too large a percentage of citizens. Finally, there is reason to believe that administrative officials would welcome the assistance of general procedural instructions which, instead of leaving them groping in the dark, would furnish a pattern of action.

There is another and perhaps even more important reason for formulating such a statement of the essentials of administrative procedure—a reason which involves the fundamentals of modern government. An adequate pattern of procedure is imperatively needed to serve as a guide to and check upon administrative officials in the exercise of their discretionary powers. Little has been said in the committee report regarding administrative discretion, but we know the great extent to which discretionary powers figure in contemporary government. The administrative agency is a principal means of injecting the element of discretion into government, and bringing the judgment of men to bear upon the multitude of situations which arise in the daily enforcement of statutes. Such discretionary power is a necessary adjunct of present-day government, but people generally do not blind themselves to the

possibilities of abuse which it affords. No more satisfactory way can be found of minimizing abuses, or the fear of abuses, than by legislative statement of standards of administrative procedure to chart the course of action, to insure publicity of process, to give the citizen every reasonable opportunity to present his case, and to insure that public officials act under circumstances calculated to produce a fair and prompt result.

Manifestly, Congress must provide alternative procedures for the making of the various kinds of rules and regulations which administrative agencies issue. In the matter of administrative adjudication, Congress should say whether or not, and in what respects, there shall be notice; whether a party is entitled to see the evidence and know the witnesses against him; whether consideration of cases shall be confined to the record or whether administrators shall be entitled to roam at large in securing additional private and untested information; whether deciding officers shall make the decisions they purport to make or whether anonymous persons shall do so; whether the uncertainties in judicial review shall be dispelled and such review simplified; and a group of similar or related subjects.

Upon such a statement of fundamentals any number of different formal procedures may be predicated. Some uniformity should be provided in the essentials. As Justice Brandeis (dissenting in *Burdeau v. McDowell*, 256 U. S. 465, 477) once said, "In the development of our liberty, insistence upon procedural regularity has been a large factor." To care for all possible contingencies, we propose that the President be given authority to suspend the operation of any provision as to any type of function or proceeding of any agency whenever he finds it impracticable or unworkable, upon full publicity and a report to Congress in connection with each suspension order. Such a provision, we think, is a necessary part of any legislation in this field.

One further purpose must be served by any such legislative statement. In several respects most agencies lack one or more essential powers of administration. A galaxy of regulatory statutes, for example, speaks solely in terms of the Secretary of Agriculture, thus ignoring the essential need for the Secretary to utilize assistance. Again, agencies are without formal direction or authority to issue types of rules or regulations which are indispensable if the citizen is to be informed of the organization and policy of any agency. Congress should recognize, specify, and confer these and other necessary powers. Otherwise, administration is unduly complicated; necessity leads to subterfuge, inactivity, hardship to the citizen, or the public, and unwarranted expense to the government; and the cry for justice is thwarted by lack of the simple means to do justice.

A judge is surrounded by an elaborate and traditional system, but an administrator is often plucked from private pursuits and given scant

guidance. He must have direction, for he has no established practice to show him the way. He must have a staff and auxiliary powers because he has no grand jury, state's attorney, or police to aid him. He must have discretion to organize and manage his job, because the pressure of events has allowed Congress no time to organize it for him. Within broad limits his judgment must be honored, because existing appellate tribunals have been organized for, and are busy with, different tasks. Such direction and such aid can be given or authorized only by Congress.

### **The Federal Administrative Procedure Act of 1946**

One of the really important events in the development of administrative law in the United States has been the enactment by Congress of the Administrative Procedure Act of 1946—an act designed to prescribe in statutory form certain basic essentials of fairness and equity in the administrative relations between the government and its citizens. The act may be subdivided into three parts: (1) Provisions for dissemination of public information concerning administrative rules and orders; (2) provisions establishing rules of practice both in rule making and in adjudication, and (3) provisions for judicial review of administrative action. This act is of such considerable significance that it is herein set forth in full. Moreover, throughout the book individual sections of the act have been quoted in their proper context. In the pages immediately following is a résumé of the history of the act as it is stated in the Report of the Committee on Judiciary of the House of Representatives. Thereafter the act itself is reprinted. Also reprinted in full along with the Administrative Procedure Act is the revision of that Act proposed in the form of a complete Administrative Code by The Hoover Commission Task Force on Legal Services and Procedure. The Hoover Task Force recommendations were made in 1956 after ten years of experience with the APA. Setting forth the APA and The Hoover Task Force Code in parallel columns reveals the trends in current thought on Administrative Procedure.

#### **Legislative History of the Federal Administrative Procedure Act—Quoted from House Report No. 1980, 79th Cong., 2d Sess., Pages 7-16**

For more than ten years this legislation has been under consideration. Certainly no measure of like character has had the painstaking and detailed study and drafting. Both the legislative and executive branches have participated, and private interests of every kind have had an opportunity to present their views. In the legislative branch there have been four major proposals for the creation of an administrative court, and at least eight for the regulation of administrative procedure. Two important studies were conducted in the executive branch under the

late President Franklin D. Roosevelt—each resulting in reports to Congress with legislative recommendations. Private individuals and organizations have made innumerable studies and recommendations. While various proposals have been made over the years, the continuous line of development leading to the present bill is clear and illuminating.

*1937 Report of President's Committee on Administrative Management.*—The growth and intensification of administrative regulation of private enterprise and other phases of American life had moved President Roosevelt early in his administration to appoint a committee to study administrative methods, functioning, and organization. Although that committee approached the problem from the standpoint of executive branch management, it was soon deeply involved in the essential public processes of administrative regulation. It issued numerous studies and an extensive report (Report with Special Studies, 1937), which President Roosevelt transmitted to Congress with his endorsement and the statement that it was “a great document of permanent importance” (p. iii). At that time he also took occasion to remark that the practice of creating administrative agencies—“who perform administrative work in addition to judicial work, threatens to develop a ‘fourth branch’ of the Government for which there is no sanction in the Constitution.”

To which the committee added (p. 40) :

“There is a conflict of principle involved in their make-up and functions. . . . They are vested with duties of administration . . . and at the same time they are given important judicial work. . . . The evils resulting from this confusion of principles are insidious and far-reaching. . . . Pressures and influences properly enough directed toward officers responsible for formulating and administering policy constitute an unwholesome atmosphere in which to adjudicate private rights. But the mixed duties of the commissions render escape from these subversive influences impossible. Furthermore, the same men are obliged to serve both as prosecutors and as judges. This not only undermines judicial fairness; it weakens public confidence in that fairness. Commission decisions affecting private rights and conduct lie under the suspicion of being rationalizations of the preliminary findings which the Commission, in the role of prosecutor, presented to itself.”

The foregoing statement reflects a widespread feeling, which has been greatly extended by the expansion of administrative controls during the subsequent war years.

The problem has been how to deal with the situation, in our complex governmental set-up, without unduly interfering with necessary governmental operations. President Roosevelt's committee recommended a drastic reform by which every agency exercising mixed functions would be divided into an administrative and judicial section. The latter, although it might be “in” a department, was to be wholly independent of the former and of executive control. While subsequent proposals (except for the minority of the later Attorney General's Committee on

Administrative Procedure, discussed hereinafter) have not suggested such a complete separation of functions, and the present bill does not go so far, the recommendations of the President's Committee on Administrative Management are—as President Roosevelt said in his message to the Congress—of permanent importance.

*1938 Senate Hearings.*—The Senate Judiciary Committee in 1938 held hearings on the proposal for the creation of an administrative court; and it issued as a committee print an elaborate study of administrative powers conferred by statute up to that time (S. 3676, 75th Cong.). However, such a proposition presents serious problems and some deficiencies. It means the creation of a special court or courts, in derogation of the regular courts with which people are familiar and which the Constitution directs the Congress to provide for the redress of all grievances and settlement of disputes. There may also be some limitations upon the functions which could be conferred upon a court. It could not, for example, exercise the rule-making power without undertaking to supplant the administrative arm entirely. Moreover, that proposal fails to reach and control the administrative process at its source. There is need for a simple and standard plan of administrative procedure, together with the statement of legal and enforceable guides for administrative officers and agents in their daily operations. In short, an important object of any legislation in this field is not only to provide judicial redress but to assure administrative fairness in the beginning so that litigation may become unnecessary.

*1939-40 Walter-Logan Bill.*—S. 915, the Walter-Logan administrative procedure bill, was favorably reported to the Senate in 1939 (S. Rept. No. 442, 76th Cong., 1st Sess.). Although a different bill is now reported to the House of Representatives, the following passages of that report are well worth quoting (pp. 9-10):

“Unfortunately the statutes providing for hearings before the so-called independent agencies of the Federal Government as well as those providing for the conduct of the affairs of the single-headed agencies, do not provide for uniform procedure for . . . hearings or for a uniform method and scope of judicial review. All argument that such uniformity is neither possible nor desirable is answered by the fact that uniformity has been found possible and desirable for all classes of both equity and law actions in the courts exercising the whole of the judicial power of the Federal Government. It would seem to require no argument to demonstrate that the administrative agencies, exercising but a fraction of the judicial power may likewise operate under uniform rules of practice and procedure and that they may be required to remain within the terms of the law as to the exercise of both *quasi-legislative* and *quasi-judicial* power.

“The results of the lack of uniform procedure for the exercise of *quasi-judicial* power by the administrative agencies have been at least threefold: (1) The respective administrative agencies give little heed to, and are little assisted by, the decisions of other administrative agencies or by the decisions of the courts applicable to such agencies; (2)

the courts are placed at considerable disadvantage because they must verify the basic statutes of all decisions relating to other administrative agencies which are cited to them, thus slowing up the writing of opinions in particular cases; and (3) individuals and their attorneys are at a disadvantage in the presentation of their administrative appeals, with the result that there is a tendency to emphasize the importance of the judiciary in the administrative process.

"In fact, the present situation of indescribable confusion is due to the fact that the Congress has ignored the development of the administrative process prior to 1861; that since such time the Congress has created administrative agencies without regard to any uniformity of the judicial review provisions and without regard to the procedure developed and proven prior to that time; and that the law schools have placed undue emphasis on the pathological aspects of administrative procedure rather than upon the statutes and the administrative processes. Added to all this has been the constantly growing complexity of the Federal Government and the resulting lack of training of most lawyers and businessmen therein.

"Furthermore the statutes, commencing with the Interstate Commerce Act, have made no provision whatever for improvement of the administrative process and rarely have these statutes attempted to prescribe, even in a general way, the scope of judicial review. The result has been that the administrative agencies and the courts have been required to work out the procedure from case to case with unnecessary fumbling in the administrative process and with unnecessary criticisms of the courts when they have attempted—not altogether with success—in their decisions to lay down general rules of trial and appellate procedure. . . ."

Meanwhile the President had directed the appointment of a committee to make further studies and recommendations, as described under the next heading of this report. Congress nevertheless passed the Walter-Logan bill. In vetoing it President Roosevelt said (H. Doc. No. 986, 76th Cong., 3d Sess., pp. 1, 3-4):

"The objective of the bill is professedly the assurance of fairness in administrative proceedings. With that objective there will be universal agreement. The promotion of expeditious, orderly, and sensible procedure in the conduct of public affairs is a purpose which commends itself not only to the Congress and the courts, but to the executive departments and administrative agencies themselves. . . .

"I am, of course, not unaware that improvement in the administrative process is as much the duty of those concerned with it as the improvement of court procedure ought to be a duty of the legal profession.

"Recognizing this, more than a year ago I directed the Attorney General to select a committee of eminent lawyers, jurists, scholars, and administrators to review the entire administrative process in the various departments of the executive Government and to recommend improvements, including the suggestion of any needed legislation. For over a year such a committee has been taking up in detail each of the several typical administrative agencies and has been holding prolonged sessions, hearings, inquiries, and discussions. Its task has proved unexpectedly complex. The objective of this committee, however, is not to hamper administrative tribunals but to suggest improvements to make the

process more workable and more just and to avoid confusions and uncertainties and litigations. I should desire to await their report and recommendations before approving any measure in this complicated field. In this thought I believe most Americans will agree. The report and recommendations will be transmitted to the Congress in a few weeks."

The committee to which the President referred had been at work for more than a year, had made an interim report, and had issued studies of the work of particular agencies. . . .

*1941 Final Report of Attorney General's Committee on Administrative Procedure.*—In December 1938 the Attorney General in a letter to President Roosevelt had reviewed the progress made in securing simplified and uniform rules of procedure for Federal court procedure, stated that "there is need for procedural reform in the wide and growing field of administrative law," and recommended the creation of an appropriate body to make the necessary studies and recommendations for congressional consideration (S. Doc. No. 8, 77th Cong., 1st Sess., p. 251). The President had agreed by letter of February 16, 1939 (p. 252). The committee had made an interim report in January 1940, setting forth mainly the comprehensive scope of its program of studies (p. 254).

. . . .

The committee's investigators examined agency records and procedures, it held executive hearings, and then written studies were issued. These usually embraced a first mimeographed study, a revision thereof, and finally the issuance of 27 printed monographs each embodying the results for one or more agencies, which became Senate documents (S. Doc. No. 186, 76th Cong., 3d Sess., pts. 1-13; and S. Doc. No. 10, 77th Cong., 1st Sess., pts. 1-14). They were widely distributed. The committee also held public hearings. Defects of the procedures of particular agencies are also summarized at length in chapter IX of the committee's final report.

There are 474 pages in the committee's final report, of which only the first 127 are the report proper. The remainder is made up of minority views (pp. 203-250) and appendixes. See *Administrative Procedure in Government Agencies—Report of the Committee on Administrative Procedure, Appointed by the Attorney General at the Request of the President, to Investigate the Need for Procedural Reform in Various Administrative Tribunals and to Suggest Improvements Therein* (S. Doc. No. 8, 77th Cong., 1st Sess., dated January 22, 1941).

The published documents relating to the present bill, notably the Senate Judiciary Committee print of June 1945 on S. 7 which collates in parallel columns the provisions of the present bill with the pertinent portions of the final report of the Attorney General's Committee on Administrative Procedure, indicate the care with which the recommendations of that committee have been studied in framing the present bill. While it follows generally the views of good administrative practice as



expressed by the whole of that committee, it differs in several important respects. It provides that agencies may choose whether their examiners shall make the initial decision or merely recommend a decision, whereas the Attorney General's committee made a decision by examiners mandatory. It provides some general limitations upon administrative powers and sanctions, particularly in the rigorous field of licensing, while the Attorney General's committee did not touch upon the subject. It relies upon independence, salary security, and tenure during good behavior of examiners within the framework of the civil service, whereas the Attorney General's committee favored short-term appointments approved by a special "Office of Administrative Procedure."

As a matter of drafting, the actual language of the present bill has had vastly more consideration and participation by all parties concerned than the bills presented in 1941 by the majority and minority of the Attorney General's Committee on Administrative Procedure. An entire year has been spent alone in redrafting the original S. 7 (H. R. 1203) of the present Congress, as hereinafter more fully explained. Its predecessor, S. 2030 (H. R. 5081), of the previous Congress, had passed through a similar process.

*Senate Hearings.*—The majority and minority bills growing immediately out of the work of the Attorney General's Committee were introduced in Congress along with revised versions of other bills. A distinguished subcommittee of the Senate Committee on the Judiciary (composed of Senator Hatch as chairman and Senators O'Mahoney, Chandler, Austin, and Danaher) then held hearings in April, May, June, and July of 1941, which were published in three parts and an appendix. (See hearings on S. 674, 675, and 918.) By far the greater part of the hearings were devoted to the oral or written statements, or both, of representatives of governmental agencies. . . . In addition, the subcommittee heard or received the written statements of representatives of business, professional, labor, and agricultural organizations as well as members of the Attorney General's Committee on Administrative Procedure. The written statement submitted by the minority members of that committee summarizes most of the testimony and statements (pp. 1374-1401) and also presents a revision of their legislative recommendations (pp. 1402-1418).

It can be said fairly that no point raised by any agency in those very lengthy and detailed hearings has not been given full consideration in the drafting of the present bill, and indeed in almost every instance the present bill avoids the difficulties which Government agencies then feared. For example, in those hearings agencies protested mainly against limitations upon delegations of authority (p. 1378), but the present bill expressly states that "nothing in this Act shall be construed to repeal delegations of authority as provided by law" (sec. 2 (a)). They feared any provision which might be construed to require them to



issue rules or regulations in advance to meet every case (p. 1381), but apart from rules of organization and procedure the present bill requires the publication only of "substantive rules adopted as authorized by law and statements of general policy or interpretations formulated and adopted by the agency for the guidance of the public" (sec. 3 (a)). Some agencies did not want hearings provided (pp. 1389-1398, 1394), and the present bill provides the details for hearings only where other statutes require a hearing. (See sec. 4 (b) and the introductory clause to sec. 5.) They wished power to make declaratory rulings to be so limited that parties would not have an absolute right to such a ruling in every case (p. 1392), and the present bill expressly confers the authority upon certain agencies to be exercised only in their "sound discretion" (sec. 5 (d)). Various agencies objected to any provision for the separation of functions in rule-making (p. 1396), a suggestion which the present bill expressly carries even further because section 5 which contains the segregation provision does not apply to rule-making and in subsection (c) makes additional exemptions.

1942-44.—In August 1941 the increasingly threatening international situation moved the Senate Judiciary Committee to postpone further consideration of the legislative proposals. The attack at Pearl Harbor occurred before the year was out. During the war years 1942-43 the subject was necessarily in abeyance; but war legislation, administration, and congressional investigations brought administrative processes more and more into prominence. In June 1944 new bills were introduced by the chairmen of the Senate and House Judiciary Committees (S. 2030 and H. R. 5081, 78th Cong., 2d Sess.), and thereafter there was a good deal of discussion and activity in and out of the Government with respect to the form such legislation should take. The Attorney General, utilizing some of the staff of his former Committee on Administrative Procedure, had a voluminous analysis made of the new bill.

1945. *The Present Bill.*—With the opening of the present Seventy-ninth Congress, revised and simplified bills were introduced in January 1945 by the chairmen of the two Judiciary Committees as S. 7 and H. R. 1203. Both chairmen called upon administrative agencies to submit their further views and suggestions in writing. Written submittals were also received from private organizations and parties. These were analyzed and, with the aid of representatives of the Attorney General and interested private organizations, in May 1945 there was issued a Senate committee print setting forth in parallel columns the bill as introduced and a tentatively revised text. This was distributed to administrative agencies, and they again submitted comments and suggestions in writing.

Thereupon the Senate Judiciary Committee had its staff make a further analysis and issued in June 1945, a large committee print setting forth in four parallel columns the text of the bill as originally

introduced, the tentatively revised text as previously published, a general explanation of provisions with references to the final report of the Attorney General's Committee on Administrative Procedure and other authorities, and a summary of agency and private views received in response to the first committee print.

At this point the full Committee on the Judiciary of the House of Representatives held hearings late in June. The House Committee on the Judiciary had kept in close touch with, and had participated fully in, the development of the bill; and it had also designated a subcommittee on the subject. Attorney General Biddle had previously indicated orally that he was prepared to recommend the enactment of an administrative procedure statute, and now indicated similarly that he was prepared to accept the draft proposed. He was, however, succeeded in office by Attorney General Tom C. Clark, who made some additions to the conference group representing the Attorney General. They entered upon 3 more months of discussions with interested Government agencies and undertook to screen and correlate views and suggestions received orally or in writing. Private parties and organizations also participated. By this time the issues had been narrowed to matters of language and expression. A final form of bill (see the revised Senate committee print dated October 5, 1945) was then submitted to and endorsed by the Attorney General by letters addressed to the committee chairmen of both Houses. (For the full text see S. Rept. No. 752, 79th Cong., 1st Sess., pp. 37-38.) . . .

*Favorable Report of the Senate Judiciary Committee.*—On November 19, 1945, the Committee on the Judiciary of the Senate unanimously reported the bill as revised (S. Rept. No. 752, 79th Cong., 1st Sess.). Its report states that (p. 1)—

"There is a widespread demand for legislation to settle and regulate the field of Federal administrative law and procedure. The subject is not expressly mentioned in the Constitution, and there is no recognizable body of such law, as there is for the courts in the Judicial Code. There are no clearly recognized legal guides for either the public or the administrators. Even the ordinary operations of administrative agencies are often difficult to know. The Committee on the Judiciary is convinced that, at least in essentials, there should be some simple and standard plan of administrative procedure."

That report contains a somewhat more brief résumé of the legislative history (pp. 1-5) than is here set forth, a general statement as to the approach of the Senate committee (pp. 5-6), a comparison of the bill with the earlier Walter-Logan bill (p. 6), a comparison with the 1941 final report of the Attorney General's Committee on Administrative Procedure (pp. 6-7), a general statement as to the structure of the bill with a diagram (pp. 7-9), a detailed analysis of provisions (pp. 9-30), and some concluding general comments (pp. 30-31). Appendix A thereto

is the Senate bill as reported. Appendix B is the letter of the Attorney General in full, together with the more detailed statement which accompanied it.

*1946 Senate Debate and Passage.*—On March 12, 1946, the bill came on the Senate floor for action. It was explained in detail. It passed on the same day without change and without an adverse vote.

*Changes Proposed by House Judiciary Committee.*—The original S. 7, as heretofore stated, was also introduced in the House of Representatives as H. R. 1203 by Chairman Hatton W. Sumners of the Judiciary Committee. A half dozen other bills on the same subject had also been introduced in the House of Representatives. The revised S. 7 as reported by the Senate Judiciary Committee (and subsequently passed by the Senate) was introduced in the House of Representatives in December 1945 as H. R. 4941 by Chairman Sumners. The designated subcommittee of the House Judiciary Committee had followed all the proceedings and language of the bill. It considered many suggested changes and alternative proposals. As a result of its deliberations, certain corrections and clarifications were written into the text of the bill and introduced as H. R. 5988 by Chairman Francis E. Walter of the subcommittee. These changes are shown in appendix A of this report. They have been submitted for comment to the Attorney General, who has approved them as shown by his letter set forth as appendix B of this report. They are obviously desirable from the standpoint of all parties concerned. Accordingly, the text of H. R. 5988 has been substituted, as a committee amendment, for S. 7 as passed by the Senate.<sup>19</sup>

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<sup>19</sup> For summary reviews of court decisions interpreting and applying the Federal Administrative Procedure Act, see: Schwartz, "The Administrative Procedure Act in Operation," 29 N. Y. Univ. L. Rev. 1173 (1954); Rhyne, "The Administrative Procedure Act: Five-Year Review Finds Protections Eroded," 37 A. B. A. J. 641 (1951).

**ADMINISTRATIVE PROCEDURE  
ACT, 60 STAT. 237  
(1946), 5 U.S.C. Sec.  
1001 et seq.**

**HOOVER TASK FORCE  
PROPOSAL FOR  
ADMINISTRATIVE  
CODE (1956)**

**TITLE**

Sec. 1. This Act may be cited as the "Administrative Procedure Act."

Sec. 1. Titles I to VII, inclusive, of this Act, divided into titles and sections according to the following table of contents, may be cited as the "Administrative Code."

**DEFINITIONS**

Sec. 2. As used in this Act—

Sec. 100. As used in this Code, except where the context clearly indicates otherwise—

(a) AGENCY.—"Agency" means each authority (whether or not within or subject to review by another agency) of the Government of the United States other than Congress, the courts, or the governments of the possessions, Territories, or the District of Columbia. Nothing in this Act shall be construed to repeal delegations of authority as provided by law. Except as to the requirements of section 3, there shall be excluded from the operation of this Act (1) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them, (2) courts martial and military commissions, (3) military or naval authority exercised in the field in time of war or in occupied territory, or (4) functions which by law expire on the termination of present hostilities, within any fixed period thereafter, or before July 1, 1947, and the functions conferred by the following statutes: Selective Training and Service Act of 1940; Contract Settlement Act of 1944; Surplus Property Act of 1944.

(a) AGENCY.—"Agency" means each authority (whether or not within or subject to review by another agency) of the Government of the United States other than Congress, the courts, or the governments of the Possessions, Territories, Commonwealths, or the District of Columbia. Except as to the requirements of section 200 of this Code, functions exercised by courts-martial and military commissions and by military or naval authority exercised in the field in time of war or in occupied territory shall be excluded from the operation of this Code. Except as to the requirements of sections 200 and 201 of this Code, arbitration and mediation functions shall be excluded from the operation of this Code. No agency or function shall be exempt from this Code, or any provision hereof, except by specific statutory reference to the Administrative Code.

(b) **PERSON AND PARTY.**—"Person" includes individuals, partnerships, corporations, associations, or public or private organizations of any character other than agencies. "Party" includes any person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in any court or agency proceeding; but nothing herein shall be construed to prevent an agency from admitting any person or agency as a party to an agency proceeding for limited purposes.

(c) **AGENCY RULE AND RULE MAKING.**—"Rule" means the whole or any part of an agency statement of general or particular applicability and future effect designed to implement or interpret law or policy or to describe the organization, procedure, or practice requirements of any agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services, or allowances therefor, or of valuations, costs, or accounting, or practices bearing upon any of the foregoing. "Rule making" means agency process for the formulation, amendment, or repeal of a rule.

(d) **AGENCY ORDER AND ADJUDICATION.**—"Order" means the whole or any part of the final disposition (whether affirmative, negative, injunctive, or declaratory in form) of any agency in any matter other than rule making, but including licensing, or any request for agency relief. "Adjudication" means agency process for the formulation of an order.

(e) **AGENCY LICENSE AND LICENSING.**—"License" includes the whole or part of any agency permit, certificate, approval, registration, charter, membership, statutory exemption, or other form of permission. "Licensing" includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation, amendment, or modification of a license, and the prescription or

(b) **PERSON AND PARTY.**—"Person" includes individuals, partnerships, corporations, associations, or public or private organizations of any character other than agencies. "Party" includes any person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in any agency proceeding; but nothing herein shall be construed to prevent an agency from admitting any person or agency as a party for limited purposes.

(c) **RULE AND RULE MAKING.**—"Rule" means the whole or any part of any agency statement of general or particular applicability and future effect designated to implement, interpret, or prescribe law or policy or to describe the organization, procedure, or practice requirements of any agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing upon any of the foregoing. "Rule making" means agency process for the formulation, amendment, or repeal of a rule.

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(e) **LICENSE AND LICENSING.**—"License" includes the whole or part of any agency permit, certificate, approval, registration, charter, membership, statutory exemption or form of permission. "Licensing" includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation amendment, modification, or conditioning of a license.

## ADMINISTRATIVE PROCEDURE ACT

(f) **SANCTION AND RELIEF.**—"Sanction" includes the whole or part of any agency (1) prohibition, requirement, limitation, or other condition affecting the freedom of any person; (2) withholding of relief; (3) imposition of any form of penalty or fine; (4) destruction, taking, seizure, or withholding of property; (5) assessment of damages, reimbursement, restitution, compensation, costs, charges, or fees; (6) requirements, revocation, or suspension of a license; or (7) taking of other compulsory or restrictive action. "Relief" includes the whole or part of any agency (1) grant of money, assistance, license, authority, exemption, exception, privilege, or remedy; (2) recognition of any claim, right, immunity, privilege, exemption, or exception; or (3) taking of any other action upon the application or petition of, and beneficial to, any person.

(g) **AGENCY PROCEEDING AND ACTION.**—"Agency proceeding" means any agency process as defined in subsections (c), (d), and (e) of this section. "Agency action" includes the whole or part of every agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act.

## PROPOSED CODE

requirement of terms, conditions, or standards of conduct thereunder.

(f) **AGENCY SANCTION AND RELIEF.**—"Sanction" includes the whole or part of any agency (1) prohibition, requirement, limitation, or other condition affecting the freedom of any person, (2) withholding of relief, (3) imposition of any form of penalty or fine, (4) destruction, taking, seizure, or withholding of property, (5) assessment of damages, reimbursement, restitution, compensation, costs, charges, or fees, (6) requirement, revocation, or suspension of a license, or the prescription or requirement of terms, conditions, or standards of conduct thereunder, or (7) taking of other compulsory or restrictive action. "Relief" includes the whole or part of any agency (1) grant of money, assistance, license, authority, exemption, exception, privilege, or remedy, (2) recognition of any claim, immunity, privilege, exemption, or exception, or (3) taking of any other action upon the application or petition of, and beneficial to, any person.

(g) **AGENCY PROCEEDING AND ACTION.**—"Proceeding" means any agency process for any rule or rule making, order or adjudication, or license or licensing. "Action" includes the whole or part of every agency rule, order, license, sanction, or relief, the denial thereof, or failure to act thereon; or the equivalent thereof in any form.

## PUBLIC INFORMATION

Sec. 3. Except to the extent that there is involved (1) any function of the United States requiring secrecy in the public interest or (2) any matter relating solely to the internal management of an agency—

Sec. 200. Except to the extent that there is involved (1) any function of the United States requiring secrecy in the public interest, or (2) any matter relating solely to the internal management of any agency—

(a) RULES.—Every agency shall separately state and currently publish in the Federal Register (1) descriptions of its central and field organization including delegations by the agency of final authority and the established places at which, and methods whereby, the public may secure information or make submittals or requests; (2) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal or informal procedures available as well as forms and instructions as to the scope and contents of all papers, reports, or examinations; and (3) substantive rules adopted as authorized by law and statements of general policy or interpretations formulated and adopted by the agency for the guidance of the public, but not rules addressed to and served upon named persons in accordance with law. No person shall in any manner be required to resort to organization or procedure not so published.

(b) OPINIONS AND ORDERS.—Every agency shall publish or, in accordance with published rule, make available to public inspection all final opinions or orders in the adjudication of cases (except those required for good cause to be held confidential and not cited as precedents) and all rules.

(a) RULES.—Every agency shall separately state and currently publish in the Federal Register and in the daily issues thereof (1) descriptions of its central and field organization, including delegations by the agency of final authority and the established places at which, and methods whereby, the public may secure information or make submittals or requests, (2) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal or informal procedures available, (3) all instructions, and a general description of all forms, for all applications, registrations, reports, contracts, examinations, or other required papers or statements used by the agency in the discharge of any of its functions, operations, or activities, as well as a statement as to where such forms or instructions may be obtained, and (4) substantive rules and statements of policy or interpretations formulated, adopted, or used by the agency other than rules addressed only to and served upon named persons, as well as all other statements relied upon by the agency as authority for, or invoked or used in the discharge of, any of its functions, operations, or activities. The Director of the Office of Legal Services and Procedure established pursuant to Title III of this Code may permit or direct any agency to use a short form or alternative method of public information where (1) notice thereof is published in the Federal Register and in the daily issues thereof, and (2) the Director certifies in writing that the short form or alternative method used is adequate to inform the public. No such description, statement, rule, notice, instruction, or other regulation which is not so published shall be valid or effective against any person or party.

(b) ORDERS AND OPINIONS.—Each agency shall promptly publish or, in accordance with the published rule of the agency stating where and how the same may be obtained or examined, make available to public inspection all orders and opinions of such agency. No order or opinion of any

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agency shall be valid or effective, nor may it be invoked by the agency for any purpose, until it has been so published or made available for public inspection and copying.

(c) PUBLIC RECORDS.—Except as otherwise required by statute, all matters of official record shall, in accordance with the published rule of the agency stating where and how the same may be examined, be made available to public inspection and copying, except information of a personal or private nature the disclosure of which the agency finds is not in the public interest. Such matters of official record shall include, but shall not be limited to, docket records, pleadings, claims, applications, testimony, exhibits, reports, or information submitted to or received by the agency in connection with any actual or proposed agency proceeding.

(c) PUBLIC RECORDS.—Save as otherwise required by statute, matters of official record shall in accordance with published rule be made available to persons properly and directly concerned except information held confidential for good cause found.

## RULE MAKING

Sec. 4. Except to the extent that there is involved (1) any military, naval, or foreign affairs function of the United States or (2) any matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts—

Sec. 201. In order to establish procedures for rule making by agencies and to afford interested persons an opportunity to participate therein—

(a) NOTICE.—General notice of proposed rule making by any agency shall be published in the Federal Register and in the daily issues thereof, unless all persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law, and shall include (1) a statement of the time, place, and nature of the public rule making proceedings, which shall not be less than thirty days after such publication, (2) reference to the authority under which the rule is proposed, and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

(a) NOTICE.—General notice of proposed rule making shall be published in the Federal Register (unless all persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law) and shall include (1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved. Except where notice or hearing is required by statute, this subsection shall not apply to interpretative rules, general state-



ments of policy, rules of agency organization, procedure, or practice, or in any situation in which the agency for good cause finds (and incorporates the finding and a brief statement of the reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(b) **PROCEDURES.**—After notice required by this section, the agency shall afford interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity to present the same orally in any manner; and, after consideration of all relevant matter presented, the agency shall incorporate in any rules adopted a concise general statement of their basis and purpose. Where rules are required by statute to be made on the record after opportunity for an agency hearing, the requirements of sections 7 and 8 shall apply in place of the provisions of this subsection.

(c) **EFFECTIVE DATES.**—The required publication or service of any substantive rule (other than one granting or recognizing exemption or relieving restriction or interpretative rules and statements of policy) shall be made not less than thirty days prior to the effective date thereof except as otherwise provided by the agency upon good cause found and published with the rule.

(b) **PROCEDURE.**—After notice of the proposed rule making is given, as required by this section, the agency shall afford all interested persons an opportunity to participate in the rule making through the submission to it of written or oral data, views, or arguments, and the agency shall fully consider the same. Simultaneously with the promulgation of the rule, the agency shall issue a concise statement of the principal considerations for and against its adoption. Where rules are required under the Constitution or by statute to be made after opportunity for a hearing by an agency, the requirements of sections 205 and 206 of this Code shall apply in place of the provisions of this subsection.

(c) **EFFECTIVE DATES.**—The required publication or service by any agency of any substantive rule, other than one granting or recognizing exemption or relieving restriction, shall be made not less than thirty days prior to the effective date thereof, except where the agency finds that due and timely execution of its functions imperatively and unavoidably requires such rule to become effective within a shorter period and publishes such finding, together with a brief statement of the reasons therefor, with the rule.

(d) **EMERGENCY RULES.**—Rules may be promulgated without the notice and procedure required by this section, to have effect for not more than 120 days without renewal, where the agency finds (1) that immediate adoption of a rule is

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necessary for the preservation of the public health, safety, or morals, and (2) that observance of the requirements of this section would be contrary to the public interest. The agency's finding and a brief statement of the reasons therefor shall be incorporated in the rule as filed for publication in the Federal Register and in the daily issues thereof.

(d) PETITIONS.—Every agency shall accord any interested person the right to petition for the issuance, amendment, or repeal of a rule.

(e) PETITIONS.—Every agency shall accord all interested persons the right to petition for the issuance, amendment, or repeal of a rule. Where the agency does not initiate rule making proceedings for such purpose, it shall promptly state its reasons for not doing so, shall transmit the same to the petitioner, and shall make the petition and the action taken by the agency, or its failure to act, matters of record available for public inspection and copying.

## ADJUDICATION

Sec. 5. In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved (1) any matter subject to a subsequent trial of the law and the facts *de novo* in any court; (2) the selection or tenure of an officer or employee of the United States other than examiners appointed pursuant to section 11; (3) proceedings in which decisions rest solely on inspections, tests, or elections; (4) the conduct of military, naval, or foreign affairs functions; (5) cases in which an agency is acting as an agent for a court; and (6) the certification of employee representatives—

(a) NOTICE.—Persons entitled to notice of an agency hearing shall be timely informed of (1) the time, place, and nature thereof; (2) the legal authority and jurisdiction under which the hearing is to be held; and (3) the matters of fact

Sec. 202. In order that there may be a full and fair determination of factual issues in every case of agency adjudication—

(a) NOTICE.—Persons entitled to notice of an agency proceeding shall be given timely information of (1) the time, place, and nature thereof; (2) the legal authority and jurisdiction under which the proceeding is to be held, and (3) the

and law asserted. In instances in which private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the times and places for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.

(b) PROCEDURE.—The agency shall afford all interested parties opportunity for (1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment where time, the nature of the proceeding, and the public interest permit, and (2) to the extent that the parties are unable so to determine any controversy by consent, hearing, and decision upon notice and in conformity with sections 7 and 8.

matters of fact and law asserted, in accordance to the extent practicable with the practice and requirements of pleading in the United States district courts. The persons to whom such notice is given shall give prompt notice of the matters of fact and law controverted by them, and their failure to do so shall constitute a waiver of contest as to such matters. In fixing the times and places for proceedings, due regard shall be had for the convenience and necessity of the parties and their representatives.

(b) PROCEDURE.—The agency shall afford all interested parties an opportunity for the submission and consideration of facts, arguments, offers of settlement, or proposals for simplification of proceedings or adjustment of controversial issues or requests by consent, whether such proceedings are interlocutory, summary, or otherwise. Where an opportunity for an agency hearing is required under the Constitution or by statute, the parties shall be accorded a hearing and decision in conformity with sections 205 and 206 of this Code. In all other cases of adjudication, which shall for this purpose include the performance of all proprietary functions such as the use or disposition of public property or the execution of public contracts in which private rights, claims, or privileges are asserted or affected, a decision shall be proposed by a duly designated and responsible officer of the agency and served upon the parties by mail or delivered in person. Every such proposed decision shall be subject to review within the agency by a board or superior officer designated by the agency as its reviewing authority for such purposes. The reviewing authority shall make its determination with respect to the proposed decision only after the receipt and full consideration of the evidence and the views and arguments of all interested parties. The findings and conclusions of law of the reviewing authority and all such evidence, views, and arguments shall be matters of record available for public inspection.

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tion and copying. In cases involving the public health, safety, or morals, in which the agency finds and states on the public record the reasons why time, the nature of the proceeding, or the public interest unavoidably and imperatively so requires, the agency may take emergency action, and the procedural requirements herein provided for shall be carried out thereafter as promptly as possible.

See Sec. 204(c).

(c) SEPARATION OF FUNCTIONS.—The same officers who preside at the reception of evidence pursuant to section 7 shall make the recommended decision or initial decision required by section 8 except where such officers become unavailable to the agency. Save to the extent required for the disposition of *ex parte* matters as authorized by law, no such officer shall consult any person or party on any fact in issue unless upon notice and opportunity for all parties to participate; nor shall such officer be responsible to or subject to the supervision or direction of any officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency. No officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency in any case shall, in that or a factually related case, participate or advise in the decision, recommended decision or agency review pursuant to section 8 except as witness or counsel in public proceedings. This subsection shall not apply in determining applications for initial licenses or to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; nor shall it be applicable in any manner to the agency or any member or members of the body comprising the agency.

(d) DECLARATORY ORDERS.—The agency is authorized in its sound discretion, with like effect as in the case of other orders, to issue a declaratory order to terminate a controversy or remove uncertainty.

See Sec. 9(b).

## LICENSING

Sec. 203. (a) IN GENERAL.—In any case in which application is made to an agency for a license required by law, the agency, with due regard to the rights and privileges of all interested parties or adversely affected persons, shall set and conduct the proceedings in accordance with this Code or as otherwise required by law.

(b) TERMS AND CONDITIONS.—Terms, conditions, or requirements limiting any license shall be invalid to the extent that they are found by a court of competent jurisdiction not to be plainly and reasonably in the public interest or not within the purposes, scope, or stated terms of the statute pursuant to which the license is issued or required.

(c) SUSPENSION AND REVOCATION.—No withdrawal, suspension, revocation, or annulment by an agency of any license shall be lawful unless, prior to the institution of agency proceedings therefor, (1) facts or conduct that may warrant such action shall have been called to the attention of the licensee by the agency in writing, (2) the agency, upon reasonable notice, shall have afforded the licensee opportunity to submit written data, views, and arguments with respect to such facts or conduct, and (3) the licensee shall have been given a reasonable opportunity to comply with all lawful requirements; except that where the agency finds that the public health, safety, or morals unavoidably and imperatively requires emergency action, and incorporates that finding in its order, summary suspension of a license may be ordered pending proceedings for revocation, which shall be promptly instituted and determined.

See Sec. 204(f).

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(d) RENEWAL.—In any case in which the licensee has made timely and sufficient application for the renewal of a license or for a new license, with reference to any activity of a continuing nature, the existing license shall not expire until such application shall have been finally determined by the agency, and, in case the application shall have been denied or the terms of the new license limited, opportunity shall be afforded for judicial review.

(e) AMENDMENT OR MODIFICATION.—Any modification or limitation of an outstanding license shall be subject to all the procedural requirements of law with respect to the revocation of a license.

## ANCILLARY MATTERS

See Secs. 600-604.

Sec. 6. Except as otherwise provided in this Act—

(a) APPEARANCE.—Any person compelled to appear in person before any agency or representative thereof shall be accorded the right to be accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified representative. Every party shall be accorded the right to appear in person or by or with counsel or other duly qualified representative in any agency proceeding. So far as the orderly conduct of public business permits, any interested person may appear before any agency or its responsible officers or employees for the presentation, adjustment, or determination of any issue, request, or controversy in any proceeding (interlocutory, summary, or otherwise) or in connection with any agency function. Every agency shall proceed with reasonable dispatch to conclude any matter presented to it except that due regard shall be had for the convenience and necessity of the parties or their representatives. Nothing herein shall be construed either to grant or to deny to any person who is not a lawyer the right to appear for or represent others before any agency or in any agency proceeding.

# MISCELLANEOUS PROCEDURAL MATTERS

(b) INVESTIGATIONS.—No process, requirement of a report, inspection, or other investigative act or demand shall be issued, made, or enforced in any manner or for any purpose except as authorized by law. Every person compelled to submit data or evidence shall be entitled to retain or, on payment of lawfully prescribed costs, procure a copy or transcript thereof, except that in a nonpublic investigatory proceeding the witness may for good cause be limited to inspection of the official transcript of his testimony.

(c) SUBPENAS.—Agency subpoenas authorized by law shall be issued to any party upon request and, as may be required by rules of procedure, upon a statement or showing of general relevance and reasonable scope of the evidence sought. Upon contest the court shall sustain any such subpoena or similar process or demand to the extent that it is found to be in accordance with law and, in any proceeding for enforcement, shall issue an order requiring the appearance of the witness or the production of the evidence or data within a reasonable time under penalty of punishment for contempt in case of contumacious failure to comply.

Sec. 204. (a) INVESTIGATIONS.—No process, requirement of a report, inspection, or other investigatory act or demand shall be initiated, issued, made, or enforced by any agency in any manner or for any purpose unless it is within the jurisdiction of the agency and is authorized by statute. Every person compelled to testify or to submit data or evidence to any agency shall be entitled to the benefit of counsel and to retain, or on payment of lawfully prescribed costs to procure, a copy of the transcript of such testimony, data, or evidence. Any court of competent jurisdiction is authorized to restrain any acts threatened or continuing contrary hereto, or to compel acts required hereby.

(b) SUBPENAS.—Presiding officers are authorized to issue subpoenas for the appearance of witnesses or the production of relevant books, records, or data in any proceeding required under the Constitution or by statute to be determined after opportunity for an agency hearing. Subpoenas shall be issued upon request without discrimination as between parties, public or private. The agency may, by rule, require a statement or showing of general relevance and reasonable scope of evidence sought. Any person subject to a subpoena may, before compliance therewith and on timely petition, obtain from any court of competent jurisdiction a ruling as to the lawfulness thereof. The court shall quash the subpoena or similar process or demand to the extent that it finds the same to be unreasonable in terms, irrelevant in scope, beyond the probable jurisdiction of the agency over the person or subject matter

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involved, not competently issued, or otherwise not in accordance with law. In any proceeding for enforcement, any court of competent jurisdiction may issue an order requiring the appearance of witnesses or the production of evidence or data within a reasonable time, under penalty of punishment for contempt in case of contumacious failure to comply therewith.

(c) SEPARATION OF FUNCTIONS.—No reviewing authority acting pursuant to section 202(b) of this Code, and no presiding or deciding officer acting pursuant to sections 205 and 206 hereof, shall (1) consult any part on any issue of fact except upon notice and opportunity for all parties to participate, save to the extent required for the disposition of ex parte matters as authorized by law, (2) be responsible to or subject to the supervision or direction of any officer, employee, or agent engaged in the performance of investigatory or prosecuting functions for the agency, (3) be advised by any other agency officer or employee except as a witness or counsel in public proceedings of which all parties have notice and in which they have full opportunity to participate, or (4) permit any other agency officer or employee to participate in any way in the formulation of findings or decisions, except that agency members, or the reviewing authority acting pursuant to section 202(b) of this Code, may have the assistance of persons who are members of an independent review staff. If it is alleged that there is a violation of this subsection in connection with any agency action, the reviewing court shall determine the facts and, if such violation is proved, may hold such agency action unlawful and invalid.

(d) EXPEDITION AND DENIALS.—Every agency shall proceed with reasonable dispatch to conclude any matter presented to it, except that due regard shall be had for the convenience and necessity of the parties or their representatives.

See Sec. 5(c).

(d) DENIALS.—Prompt notice shall be given of the denial in whole or in part of any written application, petition, or other request of any interested person made in connection with any agency proceeding. Except in affirming a prior



denial or where the denial is self-explanatory, such notice shall be accompanied by a simple statement of procedural or other grounds.

Prompt notice shall be given of the denial in whole or in part of any written application, petition, or other request of any interested person made in connection with any agency proceeding or action, and such notice shall be accompanied by a simple statement of the grounds therefor. Upon application made to any court of competent jurisdiction by a party to any agency proceeding or action, and a showing to the court that there has been undue delay in connection with such proceeding or action, the court may issue a mandatory injunction to the agency involved to proceed to a decision in the matter. In any such case the agency involved may show that the delay was necessary and unavoidable.

(e) **INSPECTIONS, TESTS, OR EXAMINATIONS.**—In any proceeding in which an agency decision rests solely on inspections, tests, or examinations, no decision by any officer or employee of the agency shall be valid or effective unless, upon appropriate request by the person or party affected, review of such inspections, tests, or examinations shall first have been afforded by a board or superior officer designated by the agency as its reviewing authority for such purposes; except that where the officer or employee finds that the public health, safety, or morals requires emergency action, and incorporates that finding in his order, summary action may be taken pending such review, which shall be promptly instituted and determined.

(f) **DECLARATORY ORDERS.**—Every agency shall provide by rule for the filing and prompt disposition of petitions for a declaratory order to terminate a controversy, or to remove uncertainty in a controversy as to the applicability to the petitioner of any statutory provision or of any rule or order of the agency. Such proceedings shall be subject to the provisions of this Code, as well as of other applicable law, and the order disposing of the petition in any such case shall have the same effect as other agency orders.

See Sec. 5(d).

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## HEARINGS

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Sec. 7. In hearings which section 4 or 5 requires to be conducted pursuant to this section—

Sec. 205. In every case of adjudication and rule making required to be made after opportunity for hearing under the Constitution or by statute, except with respect to the selection of persons for, their tenure in, and dismissal from, the civilian and military service of the United States—

(a) **PRESIDING OFFICERS.**—There shall preside at the taking of evidence (1) the agency, (2) one or more members of the body which comprises the agency, or (3) one or more examiners appointed as provided in this Act; but nothing in this Act shall be deemed to supersede the conduct of specified classes of proceedings in whole or part by or before boards or other officers specially provided for by or designated pursuant to statute. The functions of all presiding officers and of officers participating in decisions in conformity with section 8 shall be conducted in an impartial manner. Any such officer may at any time withdraw if he deems himself disqualified; and, upon the filing in good faith of a timely and sufficient affidavit of personal bias or disqualification of any such officer, the agency shall determine the matter as a part of the record and decision in the case.

(b) **HEARING POWERS.**—Officers presiding at hearings shall have authority, subject to the published rules of the agency and within its powers, to (1) administer oaths and affirmations, (2) issue subpoenas authorized by law, (3) rule upon offers of proof and receive relevant evidence, (4) take or cause depositions to be taken whenever the ends of justice would be served thereby, (5) regulate the course of the hearing, (6) hold conferences for the settlement or simplification of the issues by consent of the parties, (7) dispose of procedural requests or similar matters, (8) make decisions or

(a) **PRESIDING OFFICERS.**—There shall preside at the taking of evidence only (1) the agency, (2) one or more members of the body which comprises the agency, (3) a hearing commissioner appointed pursuant to Title V of this Code, or (4) a board specifically authorized by statute to conduct specified classes of proceedings. The functions of all such presiding officers, as well as officers participating in decisions in conformity with section 206 of this Code, shall be conducted in an impartial manner. Any such officer may at any time withdraw if he deems himself disqualified, and, upon the filing in good faith by a party of a timely and sufficient affidavit of personal bias or disqualification of any such officer, the agency or a hearing commissioner assigned for that purpose shall promptly determine the matter as a part of the record and decision in the case.

(b) **HEARING POWERS.**—Presiding officers shall have authority to (1) administer oaths and affirmations, (2) issue subpoenas, (3) rule upon offers of proof and receive evidence, (4) take depositions, or cause depositions to be taken, upon oral examination or written interrogatories for the purpose of discovery or for use as evidence in the proceeding, and dispose of motions for the discovery and production of relevant documents and things for inspection, copying, or photographing, (5) regulate the course of the hearings, (6) direct the parties to appear and confer to consider the simplification

recommend decisions in conformity with section 8, and (9) take any other action authorized by agency rule consistent with this Act.

of the issues, admissions of fact or of documents to avoid unnecessary proof, and limitation of the number of expert witnesses, and issue an appropriate order therefor which shall control the subsequent course of the proceeding, (7) dispose of motions to dismiss for lack of jurisdiction by the agency over the subject matter or parties or for any other proper reason, (8) dispose of motions to amend, or to dismiss without prejudice, application and other pleadings, (9) dispose of procedural requests or similar matters, (10) make decisions, (11) reprimand or exclude from the hearing any person for any improper or indecorous conduct in their presence, and (12) take any other action authorized by any rule consistent with this Code or in accordance, to the extent practicable, with the trial procedure in the United States district courts.

(c) **INTERLOCUTORY APPEALS.**—A presiding officer may certify to the agency, or allow the parties an interlocutory appeal on, any material question arising in the course of a proceeding, where he finds that it is necessary to do so to prevent substantial prejudice to any party or to expedite the conduct of the proceeding. The presiding officer or the agency may thereafter stay the proceeding if necessary to protect the substantial rights of any of the parties therein. The agency, or such one or more of its members as it may designate, shall determine the question forthwith, and the hearing and further decision shall thereafter be governed accordingly. No interlocutory appeal shall otherwise be allowed.

(e) **EVIDENCE.**—Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof. Any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion

(d) **EVIDENCE.**—Except as otherwise provided by statute, the proponent of a rule or order shall have the burden of proof, and every party to any agency proceeding shall have the right to present his case or defense by oral or document-

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of irrelevant, immaterial, or unduly repetitious evidence and no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence. Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses any agency may, where the interest of any party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

See Sec. 7(d).

(d) RECORD.—The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding,

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tary evidence, to submit rebuttal evidence, and to conduct such cross examination as may be required for a full and true disclosure of the facts. In rule making, any oral or documentary evidence may be received, but, as a matter of policy, there shall be excluded all irrelevant, immaterial, or unduly repetitious evidence. No rule shall be made by any agency except upon consideration of the whole record, or such portions thereof as may be cited by the parties to the agency proceedings, and any such rule shall be supported by and shall be in accordance with the reliable, probative, and substantial evidence in the record. In adjudications, the rules of evidence and requirements of proof shall conform, to the extent practicable, with those in civil nonjury cases in the United States district courts. The agency may by general rule adopt procedures, or the presiding officer may specially provide, for the submission of all or part of the evidence in written form, provided that no party is substantially prejudiced thereby. The complete transcript of the record in any agency proceeding shall be made available to the parties upon payment of lawfully prescribed costs.

(e) OFFICIAL NOTICE.—Where the decision by any agency includes official notice of a material fact beyond the evidence appearing in the record, the decision shall be without force or effect unless (1) the fact so noticed is specified in the record or is brought to the attention of the parties before decision, and (2) every party adversely affected by the decision is afforded an opportunity to controvert the fact so noticed: *Provided*, That nothing in this subsection shall affect the application by an agency in appropriate circumstances of the doctrine of judicial notice.

See Sec. 207(e).

shall constitute the exclusive record for decision in accordance with section 8 and, upon payment of lawfully prescribed costs, shall be made available to the parties. Where any agency decision rests on official notice of a material fact not appearing in the evidence in the record, any party shall on timely request be afforded an opportunity to show the contrary.

## DECISIONS

Sec. 8. In cases in which a hearing is required to be conducted in conformity with section 7—

(a) ACTION BY SUBORDINATES.—In cases in which the agency has not presided at the reception of the evidence, the officer who presided (or, in cases not subject to subsection (c) of section 5, any other officer or officers qualified to preside at hearings pursuant to section 7) shall initially decide the case or the agency shall require (in specific cases or by general rule) the entire record to be certified to it for initial decision. Whenever such officers make the initial decision and in the absence of either an appeal to the agency or review upon motion of the agency within time provided by rule, such decision shall without further proceedings then become the decision of the agency. On appeal from review of the initial decisions of such officers the agency shall, except as it may limit the issues upon notice or by rule, have all the powers which it would have in making the initial decision. Whenever the agency makes the initial decision without having presided at the reception of the evidence, such officers shall first recommend a decision except that in rule making or determining applications for initial licenses (1) in lieu thereof the agency may issue a tentative decision or any of its responsible officers may recommend a decision or (2) any such procedure may be omitted in any case in which the agency finds upon the record that due and timely execution of its functions imperatively and unavoidably so requires.

Sec. 206. In every case of adjudication and rule making required under the Constitution or by statute to be determined after opportunity for an agency hearing—

See Sec. 206(c).

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(b) SUBMITTALS AND DECISIONS.—Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusions. The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions) shall become a part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof.

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(a) SUBMITTALS AND DECISIONS.—Prior to each decision by an agency which presides, or the initial decision by a presiding officer in an agency proceeding, the parties to the agency proceeding shall be afforded an opportunity to submit (1) proposed findings of fact, and (2) both written and oral argument. Upon review of any initial decision, the agency shall afford the parties an opportunity to submit (1) written exceptions to the decision, (2) written briefs and arguments thereon, and (3) oral argument unless it shall find that full and adequate presentation of the issues does not so require. The official record shall show the ruling upon each finding or exception presented; and, in the absence thereof, no agency action, decision, conclusion, or finding based thereon shall be final or effective. All decisions and initial decisions shall include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record, and (2) the appropriate rule, order, sanction, relief, or denial thereof; and such decisions and initial decisions shall become a part of the official record of the case and be available for public inspection and copying.

See Sec. 7(d).

(b) RECORD FOR DECISIONS.—For the purpose of the decision by an agency which presides, or the initial decision by a presiding officer in an agency proceeding, the record shall include (1) all pleadings, motions, and intermediate rulings, (2) evidence received or considered, including oral testimony, exhibits, and matters officially noticed, (3) offers of proof and rulings thereon, and (4) the findings proposed. No other evidence shall be considered by the agency or by the presiding officer. In cases in which the agency has presided at the reception of the evidence, the agency shall prepare, file, and serve upon the parties its decision. In all other cases the presiding officer shall prepare and file an initial decision, except where the parties to the proceeding, upon the closing of the record and with the consent of the agency, expressly waive their right to have an initial decision rendered by the presiding officer. In the absence of an appeal to the agency or a review upon motion of the agency within the time provided for such review by rule, every such initial decision shall thereupon become the decision of the agency.

## ADMINISTRATIVE PROCEDURE ACT

See Sec. 8(a).

## PROPOSED CODE

(c) REVIEW BY AGENCY.—For the purpose of review by the agency of the initial decision of the presiding officer, the record shall include (1) all matters constituting the record upon which such initial decision by the presiding officer was based, (2) the rulings upon the proposed findings, (3) the initial decision and findings of the presiding officer, and (4) the exceptions filed. No other evidence shall be considered by the agency upon such review. Issues may be limited on review by agency rule or upon notice to the parties to the proceeding. On review of initial decisions in adjudications and in rule making required under the Constitution or by statute to be made after hearing, the scope of review by the agency, except for questions of policy committed to the determination of the agency by the Congress, shall be the same as that of the court upon review of the decision of the agency. The agency may either remand the case to the presiding officer for such further proceedings as it may direct, or it may affirm, set aside, or modify the order, or any sanction or relief entered thereon, in conformity with the facts and the law.

## (d) NONAVAILABILITY OF PRESIDING OFFICERS.

—In any case in which an officer who has presided at the reception of evidence in an agency proceeding is disqualified or otherwise becomes unavailable, another presiding officer shall be assigned to continue with the case and thereupon shall have all the duties and powers of the officer he replaces.



## SANCTIONS AND POWERS

Sec. 9. In the exercise of any power or authority—

(a) IN GENERAL.—No sanction shall be imposed or substantive rule or order be issued except within jurisdiction delegated to the agency and as authorized by law.

(b) LICENSES.—In any case in which application is made for a license required by law the agency, with due regard to the rights or privileges of all the interested parties or adversely affected persons and with reasonable dispatch, shall set and complete any proceedings required to be conducted pursuant to sections 7 and 8 of this Act or other proceedings required by law and shall make its decision. Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, no withdrawal, suspension, revocation, or annulment of any license shall be lawful unless, prior to the institution of agency proceedings therefor, facts or conduct which may warrant such action shall have been called to the attention of the licensee by the agency in writing and the licensee shall have been accorded opportunity to demonstrate or achieve compliance with all lawful requirements. In any case in which the license has in accordance with agency

See Sec. 203.

## ADMINISTRATIVE PROCEDURE ACT

rules, made timely and sufficient application for a renewal or a new license, no license with reference to any activity of a continuing nature shall expire until such applications shall have been finally determined by the agency.

## PROPOSED CODE

## JUDICIAL REVIEW

Sec. 10. Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

(a) RIGHT OF REVIEW.—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

(b) FORM AND VENUE OF ACTION.—The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

Sec. 207. In order to assure a plain, simple, and prompt judicial remedy for every legal wrong resulting from agency action, and notwithstanding any limitation by statute on the jurisdictional amount in controversy—

(a) RIGHT OF REVIEW.—Any person adversely affected or aggrieved by agency action, including the failure of an agency to comply with any provision of this Code, shall be entitled to judicial review thereof. Proceedings for review may be brought against (1) the agency by its official title, (2) individuals who comprise the agency, or (3) any person representing the agency or acting on its behalf or account or under color of its authority.

(b) FORM OF ACTION.—A person so adversely affected or aggrieved may contest the validity of agency action in a civil or criminal case brought by the agency, or on its behalf, for judicial enforcement, regardless of the availability or pendency of administrative review proceedings with respect to such agency action. All other cases for review of agency decisions shall be commenced by the filing of a petition for review in the United States district court of appropriate jurisdiction except where a statute provides for judicial review in a specially constituted or named court. The petition shall contain the grounds upon which jurisdiction and venue are based, a concise and plain statement of the facts upon which

petitioner bases his claim that he has been adversely affected or aggrieved, the reasons which the petitioner asserts entitle him to relief, and a statement of the relief which the petitioner seeks.

(c) REVIEWABLE ACTS.—Every agency action shall be subject to judicial review. Any preliminary, procedural, or intermediate agency act or ruling shall be immediately reviewable in any case in which review of the final agency action would not provide an adequate remedy. Agency action shall be reviewable for the purposes of this section whether or not (1) any application for a declaratory order or any other form of reconsideration has been presented or considered, or (2) an appeal to superior agency authority has been taken, except where during the pendency thereof the agency provides that such action shall be inoperative.

(c) REVIEWABLE ACTS.—Every agency action made reviewable by statute and every final agency for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority.

(d) INTERIM RELIEF.—Pending judicial review any agency is authorized, where it finds that justice so requires, to postpone the effective date of any action taken by it. Upon such conditions as may be required and to the extent necessary to prevent irreparable injury, every reviewing court (including every court to which a case may be taken on appeal from or upon application for certiorari or other writ to a reviewing court) is authorized to issue all necessary and appropriate process to postpone the effective date of any agency action or to preserve status or rights pending conclusion of the review proceedings.

(d) INTERIM RELIEF.—Upon a finding that irreparable injury will otherwise result, (1) the agency, or the presiding officer in the case whose initial decision has become final and is the subject of the review, either on motion or on application therefor, shall postpone the effective date of the agency action pending judicial review, and (2) every reviewing court, including every court to which a case may be taken on appeal from or upon application for certiorari or other writ to a reviewing court, upon application therefor and regardless of whether such an application previously shall have been made or denied by any agency or presiding officer, shall issue all necessary and appropriate process to postpone the effective date of any agency action or to preserve the status of the case or the rights of the parties pending conclusion of the review proceedings.

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See Sec. 7(d).

### PROPOSED CODE

(e) RECORD ON REVIEW.—In every case of agency action subject to sections 205 and 206 of this Code, the record on review shall include (1) all matters constituting the record for action or review by the agency, (2) rulings upon exceptions, and (3) the decision, findings, and action of the agency. In every such case the reviewing court by rule, or the parties by stipulation, may limit the record on review, and agencies as well as private parties shall be subject to the assessment of costs in the discretion of the reviewing court for inclusion of matter in the record on review which is not relevant to the issues to be decided upon review. In all other cases, the record on review shall be made by trial de novo in the reviewing court and shall include all papers, documents, records, reports, statements, or other written matter filed with or submitted to the agency under the provision of any order, rule, or regulation of the agency, or of any applicable statute, and all forms of agency action taken or denied thereon.

(e) SCOPE OF REVIEW.—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an

(f) SCOPE OF REVIEW.—The reviewing court shall determine whether agency findings, inferences, conclusions, or actions (1) are arbitrary or capricious, (2) constitute an abuse of clearly unwarranted exercise of discretion, or a denial of statutory right, (3) are contrary to constitutional right, power, privilege, or immunity, (4) are in excess of statutory jurisdiction, authority, purposes, or limitations, (5) fail to comply with the procedures or procedural limitations imposed by this Code or otherwise required by law, or (6) (i), to the extent that cases are subject to sections 205 and 206 of this Code, are clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record, or (ii), in all other cases or with respect to all other issues, are unwarranted by the facts as established and determined in and by the reviewing court.

agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial *de novo* by the reviewing court. In making the foregoing determinations the courts shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

(g) DECISIONS ON REVIEW.—The reviewing court shall disregard technical errors which it finds to be nonprejudicial. The reviewing court shall determine all relevant questions of law and interpret any constitutional and statutory provision involved, and it shall apply such determination to the facts duly found or established, whether or not such court is the trier of the facts. To the extent that any agency action is found by the reviewing court to be in accordance with law in all material respects, the court shall direct any appropriate enforcement requested. Where the agency action is found by the reviewing court not to be in accordance with law in any material respect, the court shall (1) compel agency action to be taken which has been unlawfully withheld or unjustifyably delayed, (2) set such action aside and restrain the enforcement thereof, and (3) afford such other relief as may be appropriate in the premises. The court shall not modify, amend, or revise any agency rule, order, or process, but, after having pronounced the law applicable, shall remand the case to the agency. The agency shall thereupon proceed in the case as it may deem proper, but only within its jurisdiction and in accordance with the judgment of such court.

(h) CONCURRENT JURISDICTION.—Where *de novo* judicial review is provided by statute of decisions of agencies which may be entered only after a hearing required under the Constitution or by statute, the parties to the agency proceeding may elect to have the case tried and determined in the first instance in a court which would have jurisdiction to review *de novo* the final decision of the agency.

## ADMINISTRATIVE PROCEDURE ACT

## PROPOSED CODE

## EXAMINERS

Sec. 11. Subject to the civil-service and other laws to the extent not inconsistent with this Act, there shall be appointed by and for each agency as many qualified and competent examiners as may be necessary for proceedings pursuant to sections 7 and 8, who shall be assigned to cases in rotation so far as practicable and shall perform no duties inconsistent with their duties and responsibilities as examiners. Examiners shall be removable by the agency in which they are employed only for good cause established and determined by the Civil Service Commission (hereinafter called the Commission) after opportunity for hearing and upon the record thereof. Examiners shall receive compensation prescribed by the Commission independently of agency recommendations or ratings and in accordance with the Classification Act of 1923, as amended, except that the provisions of paragraphs (2) and (3) of subsection (b) of section 7 of said Act, as amended, shall not be applicable. Agencies occasionally or temporarily insufficiently staffed may utilize examiners selected by the Commission from and with the consent of other agencies. For the purpose of this section, the Commission is authorized to make investigations, require reports by agencies, issue reports, including an annual report to the Congress, promulgate rules, appoint such advisory committees as may be deemed necessary, recommend legislation, subpoena witnesses or records, and pay witness fees as established for the United States courts.

See Secs. 500-507.

## CONSTRUCTION AND EFFECT

Sec. 12. Nothing in this Act shall be held to diminish the constitutional rights of any person or to limit or repeal additional requirements imposed by statute or otherwise recognized by law. Except as otherwise required by law, all requirements or privileges relating to evidence or procedure shall apply equally to agencies and persons. If any provision of this Act or the application thereof is held invalid, the remainder of this Act or other applications of such provision shall not be affected. Every agency is granted all authority necessary to comply with the requirements of this Act through the issuance of rules or otherwise. No subsequent legislation shall be held to supersede or modify the provisions of this Act except to the extent that such legislation shall do so expressly. This Act shall take effect three months after its approval except that sections 7 and 8 shall take effect six months after such approval, the requirement of the selection of examiners pursuant to section 11 shall not become effective until one year after such approval, and no procedural requirement shall be mandatory as to any agency proceeding initiated prior to the effective date of such requirement.

See Sec. 700.

**Sections of Proposed Administrative  
Code Relating to Matters Not  
Provided for in Administrative  
Procedure  
Act**

**LIMITATIONS OF AUTHORITY**

SEC. 208. In the exercise of any power, authority, or discretion by any agency, or by any officer or employee thereof—

(a) **IN GENERAL.**—No sanction shall be imposed and no substantive rule or order shall be issued except within the letter, purpose, and intent of applicable statutes and the limitations of jurisdiction, powers, and authority prescribed by statute or otherwise imposed by law. Agency action shall not be deemed to be within the statutory authority and jurisdiction of the agency merely because such action is not contrary to the specific provisions of a statute.

(b) **NOTICE BY RULE.**—No sanction shall be imposed against a person for pursuing a normal, customary, or previously acceptable course of conduct, unless such conduct shall have been proscribed or restricted by a generally applicable rule of the agency. For such purposes, every agency is authorized to make and promulgate appropriate rules.

(c) **GOOD FAITH RELIANCE.**—No sanction shall be imposed by any agency for any act done or omitted in good faith by any person in conformity with, or in reliance upon, any rule, or any advisory letter, opinion, or other written statement of the agency addressed in writing to such person and obtained by him without fraud or material misrepresentation, notwithstanding the fact that, after such act or omission has taken place, such rule, or such letter, opinion, or other written statement is modified, amended, rescinded, revoked, or held invalid by the agency for any reason. Agencies shall by rule designate the classes of officials who are authorized to issue advisory letters, opinions, and other written statements upon which reliance may be placed.

(d) **REPETITIOUS AGENCY PROCEEDINGS.**—Not more than one hearing shall be held in any proceeding subject to section 205 of this Code except on remand by an agency to a presiding officer, or on remand by a reviewing court to the agency, or upon stipulation of all parties to the proceeding.

(e) **PUBLICITY.**—Agency publicity, which a reviewing court finds was issued to discredit a person under investigation or a party to an agency proceeding, may be considered by the court as a prejudicial prejudging of the issues in controversy, and the court may set aside any action taken by the agency against such person or party or enter such further order as it deems appropriate in the premises.

(f) **TERMS OF RULES AND ORDERS.**—No court shall in any manner enforce any agency rule or order, or hold the same to be valid or effective, except within the literal, definite, and specific terms thereof. Every reviewing court shall declare any such rule or order to be unlawful if its terms (1) are vague, indefinite, or uncertain in any material respect, or (2) exceed the scope permissible upon the facts or the record on which such agency action is required to be made or sought to be justified.

(g) **PROCEEDINGS IN EXCESS OF JURISDICTION.**—Any court of competent jurisdiction may intervene at any time to prevent by injunc-



tion or otherwise the holding or conducting of any agency proceeding in which the action proposed to be taken by the agency is beyond the constitutional or statutory jurisdiction or authority of the agency.

### TITLE III—OFFICE OF LEGAL SERVICES AND PROCEDURE

#### ESTABLISHMENT

SEC. 300. There shall be in the Department of Justice an Office of Legal Services and Procedure which shall be under the direction of an officer learned in the law to be known as the Director of the Office of Legal Services and Procedure.

#### FUNCTIONS

SEC. 301. The Director of the Office of Legal Services and Procedure shall issue directives to agencies (1) for the simplification, clarification, and uniformity of rules of substance and procedure, (2) for compliance with or making exceptions to the public information requirements of section 200 of this Code in accordance with the provisions of that section, and (3) for the furnishing of reports and statistical data relating to legal services and procedures of agencies. The Director shall perform such other duties as the Attorney General may prescribe.

#### APPOINTMENT OF DIRECTOR

SEC. 302. The Director of the Office of Legal Services and Procedure shall be appointed by the President, by and with the advice and consent of the Senate. His compensation shall be at the rate of \$15,000 a year.

#### INSPECTION

SEC. 303. The Director of the Office of Legal Services and Procedure, or an assistant designated by him, shall have authority to examine the records, files, and dockets of agencies at all reasonable times in the performance of his duties under this title.

#### COMPLIANCE

SEC. 304. All agencies shall comply with directives and requests of the Director of the Office of Legal Services and Procedure issued or made in accordance with the provisions of this title.

### TITLE IV—ADMINISTRATIVE COURT OF THE UNITED STATES

#### ESTABLISHMENT

SEC. 400. There is hereby established a court of record which shall be known as the Administrative Court of the United States, hereinafter referred to as the "Administrative Court." The Court shall consist of two Sections, a Tax Section with sixteen judges, and a Trade Section with three judges. All judges of the Administrative Court shall be appointed by the President, by and with the advice and consent of the Senate,

except that the judges of the Tax Court of the United States in office on the effective date of this Code are hereby transferred to the Tax Section of the Administrative Court and shall serve as judges thereof until their respective terms expire, or they shall retire or resign, or are otherwise removed from office in accordance with law. The President shall designate one of the judges of the Administrative Court as the Chief Judge of such Court. A vacancy in the office of judge of such Court shall be filled in the same manner as in the case of an original appointment to such office. The Administrative Court shall have a seal which shall be judicially noticed.

#### TENURE, SALARIES, AND OFFICIAL STATION OF JUDGES

SEC. 401. Judges of the Administrative Court shall hold office during good behavior, except as otherwise provided in section 400 of this Code. The Chief Judge and each associate judge shall receive a salary at the rate of \$15,000 a year. The official station of the judges of the Administrative Court shall be the District of Columbia.

#### PRECEDENCE OF JUDGES

SEC. 402. The Chief Judge of the Administrative Court shall have precedence and shall preside over the Administrative Court. In the absence or disability of the Chief Judge, other judges shall have precedence and preside according to the seniority of their commissions. Judges whose commissions bear the same date shall have precedence according to seniority in age.

#### RESIGNATION AND RETIREMENT OF JUDGES

SEC. 403. The provisions of Chapter 17 of title 28 of the United States Code shall apply to the judges of the Administrative Court: *Provided*, That any judge serving on the Tax Court of the United States upon the effective date of this Code may elect in a writing filed with the Chief Judge of the Administrative Court within thirty days after the effective date of this Code to continue instead to be subject to the provisions of section 7447 of the Internal Revenue Code of 1954: *Provided further*, That service as a judge of the Tax Court and as a judge of the Administrative Court shall be credited for either purpose.

#### SECTIONS AND DIVISIONS

SEC. 404. (a) SECTIONS.—The Chief Judge of the Administrative Court may assign one or more judges of a Section of such Court to sit upon the other Section thereof whenever the business of the Court so requires. Each Section shall elect a Presiding Judge thereof annually from among its members, but the Chief Judge of the Administrative Court shall not serve as Presiding Judge.

(b) DIVISIONS.—The Presiding Judge of each Section may from time to time divide such Section into divisions of one or more judges, assign the judges of the Section thereto, and, in case of a division of more than one judge, designate a Presiding Judge thereof. If at any time a division, as a result of a vacancy or the absence or inability of a judge assigned thereto, is composed of less than the number of judges designated for the division, the Presiding Judge of such Sec-

tion may assign other judges to the division, or may direct the division to proceed with the transaction of business without assigning any additional judges thereto if there is a quorum of such division without such assignment.

#### SESSIONS, QUORUM, AND VACANCIES

SEC. 405. (a) SESSIONS.—The sessions of the Administrative Court and of each Section, division, and judge thereof may be held at such times and places within the United States as the court or Section may fix by rule.

(b) QUORUM.—A majority of the judges of any Section of the Administrative Court or of any division of any such Section shall constitute a quorum for the transaction of the business of such Section or division, respectively.

(c) VACANCIES.—A vacancy in any Section or in any division thereof shall not impair the powers or affect the duties of that Section or division, or of the remaining judges of the Section or division, respectively.

#### COUNCIL

SEC. 406. (a) ESTABLISHMENT.—The Chief Judge of the Administrative Court and the Presiding Judge of each Section thereof shall constitute collectively the Council of the Administrative Court, hereinafter referred to as the "Council."

(b) DUTIES.—The Council shall meet from time to time, upon call of the Chief Judge, to survey the condition of the business in the Sections of the Administrative Court. The Council shall prepare plans for the assignment of judges from Sections where necessary, shall review and approve or disapprove the rules of each Section, and shall submit suggestions to the various Sections in the interest of uniformity and expedition of business. The Council shall designate and appoint three or more members of the Administrative Court with exclusive jurisdiction to hear and determine, from time to time as the occasion may require, all cases or controversies respecting the selection, tenure, suspension, or discharge of hearing commissioners. The Council shall approve, disapprove, or modify such rules as the Chief Hearing Commissioner, provided for by section 500 of this Code, may propose with respect to personnel supervision of hearing commissioners.

#### COURT COMMISSIONERS

SEC. 407. (a) APPOINTMENT.—The Council shall appoint court commissioners in such numbers as may be required to enable each Section to exercise its jurisdiction. Each court commissioner shall receive compensation at the rate of \$14,000 a year, and all necessary traveling expenses and reasonable maintenance expenses actually incurred while taking testimony or transacting other official business at a place other than his official station.

(b) ASSIGNMENT.—The Chief Judge shall assign court commissioners as the business of each Section may require.

(c) POWERS AND DUTIES.—Court commissioners may, in accordance with the rules and orders of the Administrative Court or any Section thereof, have and exercise all the powers of a judge of such Court, or such portion thereof as may be authorized.

## ADMINISTRATIVE OFFICE AND PERSONNEL

SEC. 408. The principal administrative office of the Administrative Court and the Sections thereof shall be at the seat of the Government. The Council shall appoint a Chief Clerk and such other clerks, marshals, deputies, and employees as may be required to assist the Council, and the Administrative Court and the Sections, divisions, judges, and commissioners thereof, in the performance of their duties.

## POWERS AND PROCEDURE

SEC. 409. (a) POWERS GENERALLY.—The Administrative Court and each Section, division, and judge thereof shall, in all actions and proceedings, possess all the powers of a district court of the United States, except as provided in subsection (b) of this section.

(b) PROCEDURE GENERALLY.—Proceedings before the Administrative Court and before any Section, division, judge, or commissioner thereof shall be governed by the Rules of Civil Procedure for the District Courts of the United States to the extent practicable. Such rules may be supplemented by rules adopted by the Administrative Court, and by its Sections with the approval of the Council. There shall be no right to have issues of fact determined by a jury in any action or proceeding in the Administrative Court.

(c) REPORTS BY COURT COMMISSIONERS.—The appropriate Section of the Administrative Court shall provide opportunity for any party to file exceptions to a court commissioner's decision, report of findings, or recommendations for conclusions of law, and to have a hearing thereon which may be oral or written as the Section shall prescribe by rule, within such reasonable time as the Section shall prescribe. Commissioners shall, in accordance with the rules and orders of the court, fix times for hearings, administer oaths, examine witnesses, receive evidence, and report findings of fact and recommendations for conclusions of law in cases assigned to them.

## JURISDICTION

SEC. 410. (a) TRADE SECTION.—The Trade Section of the Administrative Court shall have jurisdiction to conduct proceedings, render judgments, and issue orders under the following statutes:

- (1) Section 11 of the Clayton Act (38 Stat. 734), as amended (U. S. C., title 15, sec. 21);
- (2) Section 5 of the Federal Trade Commission Act (38 Stat. 719), as amended (U. S. C., title 15, sec. 45);
- (3) Section 411 of the Civil Aeronautics Act (52 Stat. 1003), as amended (U. S. C., title 49, sec. 491);
- (4) Section 337 (c) of the Tariff Act of 1930 (46 Stat. 703), as amended (U. S. C., title 19, sec. 1337 (c));
- (5) Section 314 (c) of the Federal Power Act, as amended (U. S. C., title 16, sec. 825m);
- (6) Section 312 (b) of the Communications Act (48 Stat. 1086), as amended (U. S. C., title 47, sec. 312 (b));
- (7) Section 2 of the Act of June 25, 1934 (48 Stat. 1214), as amended (U. S. C., title 15, sec. 522);
- (8) Sections 203 and 205 of the Packers and Stockyards Act (42 Stat. 161), as amended (U. S. C., title 7, sec. 193); and

(9) Section 2 of the Act of February 18, 1922 (42 Stat. 388), (U. S. C., title 7, sec. 292).

(b) **TAX SECTION.**—The Tax Section of the Administrative Court shall have the same jurisdiction as provided by law on the effective date of this Code for the Tax Court of the United States. Every statutory reference to the Tax Court shall be deemed to apply to the Administrative Court, Tax Section, except where inconsistent with a provision of this Code, in which event the provisions of this Code shall apply. Any case pending in the Tax Court of the United States upon the effective date of this Code shall continue for all purposes as a case in the Tax Section of the Administrative Court.

#### REVIEW

SEC. 411. A party to a proceeding before the Administrative Court, or any Section, division, or judge thereof, may obtain review of any judgment or order entered therein in the court of appeals of the United States within any circuit in which (1) the act or practice in question occurred, (2) the party resides or is engaged in business, or (3) the proceeding was heard by a judge or commissioner of the Administrative Court. The court of appeals shall review such judgment or order in the same manner and to the same extent as decisions of the United States district courts in civil nonjury cases are reviewed. The judgment of the court of appeals shall be final, except that it shall be subject to review by the Supreme Court of the United States in the manner provided in section 1254 of title 28 of the United States Code.

#### REPRESENTATION

SEC. 412. (a) **UNITED STATES.**—In any proceeding before the Administrative Court, or any Section, division, or judge thereof, the United States shall be represented either by the chief legal officer of the agency which initiated the proceeding, if his appointment was made pursuant to specific statutory authority therefor, or by the Attorney General.

(b) **PRIVATE PARTIES.**—Private parties shall be represented by attorneys-at-law in all proceedings for any purpose in the Administrative Court; except that any person who is licensed to appear before the Tax Court of the United States upon the effective date of this Code may continue to represent private parties before the Tax Section of such Court.

### TITLE V—HEARING COMMISSIONERS

#### CHIEF HEARING COMMISSIONER

SEC. 500. There shall be attached to the Administrative Court an officer learned in the law to perform duties relating to the personnel supervision of the senior hearing commissioners and the hearing commissioners provided for in section 502 of this Code. He shall be called the Chief Hearing Commissioner, shall be appointed by the President, by and with the advice and consent of the Senate, for a term of twelve years, and shall receive a salary at the rate of \$15,000 a year. During his term of office, the Chief Hearing Commissioner may be removed

only for cause, by and after opportunity for hearing before the Council established by section 406 of this Code, and upon the grounds specified in section 507 (a) hereof.

#### ADVISORY COMMITTEE

SEC. 501. There shall be an Advisory Committee to the Chief Hearing Commissioner, hereinafter referred to as the "committee", which shall be appointed by the Council of the Administrative Court. The committee shall consist of five members, not more than three of whom shall be members of the same political party. The chairman of the committee shall be a judge of the Administrative Court, two members thereof shall be officials of agencies, and the other two members shall be attorneys-at-law experienced in representing persons, parties, or organizations before agencies. Four members of the committee shall constitute a quorum. The Administrative Court shall provide such facilities and services as the committee shall require. The committee shall prepare, publish, and periodically review and modify, as it deems advisable, qualifications for the appointment of senior hearing commissioners and hearing commissioners.

#### HEARING COMMISSIONERS

SEC. 502. There shall be such number of senior hearing commissioners and hearing commissioners as the Chief Hearing Commissioner, in consultation with the agencies concerned, determines to be necessary to conduct the hearings for agencies pursuant to sections 205 and 206 of this Code. The term "hearing commissioner" as hereinafter used in this title includes hearing commissioner and senior hearing commissioner unless otherwise indicated.

#### APPOINTMENT

SEC. 503. (a) **FORMER HEARING EXAMINERS.**—Initial appointments of hearing commissioners shall be made exclusively from persons who have served as examiners under section 11 of the Administrative Procedure Act for a period of at least one year immediately preceding the effective date of this Code. No other person shall be appointed a hearing commissioner until the expiration of two years from the effective date of this Code, unless within such period all such examiners have been given the opportunity of appointment as hearing commissioners.

(b) **TEMPORARY APPOINTMENT.**—All examiner positions heretofore established or existing pursuant to section 11 of the Administrative Procedure Act are hereby terminated. A person serving as an examiner under such section 11 may be retained as a temporary hearing commissioner until he is appointed a hearing commissioner under this Code. Temporary hearing commissioners may be removed either because of reduction in force or for cause. Removal for cause shall be in accordance with the procedures prescribed by section 507 of this Code. No person who is serving as a temporary hearing commissioner shall receive increased compensation by reason of the enactment of this Code.

(c) **PERMANENT APPOINTMENT.**—Hearing commissioners shall be nominated for appointment by the Chief Hearing Commissioner, who shall submit the name of each nominee to the committee together with the complete file of information upon the basis of which the nomi-

nation was made. The committee shall meet upon call of its chairman and shall, within thirty days after receipt of the nomination, certify that the nominee is or is not qualified for appointment. The committee may interview the nominee and other informed persons. If, by majority vote of the members present, the committee shall disapprove the nominee as not qualified, the nominee shall not be appointed. If the committee shall approve the nomination, the Chief Hearing Commissioner shall forthwith appoint the person to the position for which he was nominated.

#### ASSIGNMENT

SEC. 504. The Chief Hearing Commissioner shall require all agencies to utilize hearing commissioners for hearings required by law to be conducted by hearing commissioners, and no agency shall utilize hearing commissioners for any other purpose. Any conflict between an agency and the Chief Hearing Commissioner in this respect shall be resolved by the Council of the Administrative Court of the United States. The Chief Hearing Commissioner shall assign and transfer hearing commissioners to and from agencies as he may determine to be necessary for the most efficient conduct of the hearings required to be held by such agencies.

#### COMPENSATION

SEC. 505. Hearing commissioners shall receive compensation at the rate of \$12,000 a year. Senior hearing commissioners shall receive compensation at the rate of \$14,000 a year.

#### TENURE

SEC. 506. Hearing commissioners shall be appointed for terms of eight years. Senior hearing commissioners shall serve during good behavior.

#### SUSPENSION AND REMOVAL

SEC. 507. (a) GROUNDS.—Hearing commissioners shall be suspended or removed only for incompetence, neglect of duty, misconduct in office, misconduct out of office involving moral turpitude, or physical or mental disability, which shall be determined after opportunity for hearing as hereinafter provided.

(b) PROCEDURE.—All complaints against hearing commissioners shall be submitted to the Chief Hearing Commissioner. If in his judgment a complaint may warrant the suspension or removal of a hearing commissioner, the Chief Hearing Commissioner shall prepare charges and specifications which he shall file with the clerk of the Administrative Court of the United States, who shall set the matter for hearing before the committee of judges named for that purpose by the Council of the Administrative Court, and who shall cause a copy of the charges and specifications and notice of hearing to be served upon the hearing commissioner involved. An order of suspension or removal of a hearing commissioner by the committee of judges shall be final, and the hearing commissioner against whom such order is made shall be forthwith suspended or removed. Within sixty days thereafter such hearing commissioner may request review of the order by the Council, sitting in banc.

If the Council grants the request, it may consider the same according to any procedure it deems appropriate. After such consideration, the Council may order the hearing commissioner reinstated under such conditions as it may reasonably require, or it may confirm the order of suspension or removal.

#### CALENDAR AND REPORTS

SEC. 508. A master calendar of agency hearings, open for public inspection, shall be maintained in the office of the Chief Hearing Commissioner. Agencies shall provide the Chief Hearing Commissioner with any information which he shall require to maintain such calendar in an active and current status and with such other information and statistical data as he shall reasonably require with respect to the work of the hearing commissioners.

### TITLE VI—APPEARANCE AND REPRESENTATION

#### APPEARANCE

SEC. 600. Every party to an agency proceeding shall be accorded the right to appear in person or by or with any attorney-at-law in good standing or, where permitted by agency rule, by any other duly qualified representative; and any person appearing in person before any agency or representative thereof shall be accorded the right to be accompanied, represented, and advised by any attorney-at-law in good standing or, where permitted by agency rule, by any other duly qualified representative. Any threatened or continuing denial of such rights may, on application to any court of competent jurisdiction, be corrected by an appropriate order of such court.

#### GENERAL STANDARDS OF CONDUCT

SEC. 601. (a) IN GENERAL.—Every individual who for any fee, salary, or other compensation, paid directly or indirectly, holds himself out as one who represents any public or private person, party, or organization, including the United States or any agency thereof, before any agency shall not—

- (1) directly or indirectly solicit clients;
- (2) advertise in any manner his attainments or services in representing others before an agency, except as expressly authorized by rule of the agency;
- (3) communicate privately with any agency, or with any members, representatives, or presiding officer thereof, with respect to the disposition of a contested case, action, or proceeding; or discuss the merits of such contested case, action, or proceeding with the agency, or with any member or presiding officer thereof in the absence of his adversary or without notice to his adversary;
- (4) attempt to sway the judgment or to influence the action of any agency, any of its officials or employees, or any presiding officer (i) by the use of threats, false accusations, or duress, (ii) by the offer of any special inducement or promise of advantage, (iii) by the bestowing of any gift or favor or other thing of value, (iv) by enlisting the influence or intercession of public officers, or (v) by threats of political or personal reprisal;



(5) engage in improper or indecorous conduct in the presence of a presiding officer in any agency proceeding; or,

(6) if any attorney-at-law, file a false statement or fail to file any statement or amended statement in conformity with section 602 of this Code.

Every agency shall issue rules to implement this subsection.

(b) **CONFLICT OF INTERESTS.**—Except as otherwise provided by statute, (1) no individual shall represent or hold himself out as representing any person, party, or organization, other than the United States or any agency thereof, before any agency or court of the United States in any agency proceeding, or in the judicial review or enforcement thereof, as to which that individual, while an employee of the United States, personally and in his official capacity dealt with, passed upon, or gained knowledge of the facts concerning such proceeding, or in the judicial review or enforcement thereof, and (2) no individual, while an employee of the United States, shall represent or hold himself out as representing any person, party, or organization other than the United States or any agency thereof before any agency or court of the United States; except that the agency which employs such individual may permit him to engage in outside legal activities in connection with legal matters involving his own family to the extent that the agency finds that such activities will not interfere with the performance of his official duties.

#### REPRESENTATION BY ATTORNEYS-AT-LAW

SEC. 602. (a) **STATEMENT.**—No attorney-at-law shall be entitled to appear for or represent any public or private person, party, or organization, including the United States or any agency thereof, before any agency, except upon the filing with such agency of a statement that he is a member in good standing of the bar of the highest court of a State, Territory, Commonwealth, or Possession of the United States or of the District of Columbia, and that he is not under suspension by such agency. No other requirement for the appearance before it of any attorney-at-law shall be imposed by any agency, except that any agency may require the filing of a power of attorney by any attorney-at-law as a prerequisite to the settlement of any controversy.

(b) **EFFECT OF FILING.**—Every agency shall recognize and deal directly with an attorney-at-law who has filed with it the statement required by subsection (a) hereof, with respect to any matters concerning which he states that he represents a person, party, or organization before such agency.

(c) **AMENDED STATEMENT.**—An attorney-at-law who has filed with an agency the statement required by subsection (a) hereof shall file an amended statement with the agency to reflect any material change in his status as an attorney-at-law prior to any further act of representation before the agency.

#### DISCIPLINE OF ATTORNEYS-AT-LAW

SEC. 603. (a) **FEDERAL GRIEVANCE COMMITTEE.**—There shall be appointed by the Chief Judge of the United States Court of Appeals for the District of Columbia a Federal Grievance Committee, hereinafter referred to as the "Committee," consisting of five attorneys-at-law, all of whom shall be members in good standing of the bar of a United States

district court. Not more than three members of the Committee shall belong to the same political party, and not more than two members of the Committee shall be employees of the United States. Members shall serve for such terms as the Chief Judge shall provide at the time of appointment, but no such term shall exceed three years.

(b) **DUTIES OF COMMITTEE.**—The Committee shall receive complaints against attorneys-at-law arising out of the representation before agencies of any public or private person, party, or organization, including the United States and any agency thereof. The Committee shall investigate all complaints filed in good faith, except that complaints filed against Government attorneys shall be first referred to the Director of the Office of Legal Services and Procedure, established pursuant to Title III of this Code, for such investigation as he may desire to make. After investigation, the Committee may dismiss the complaint with or without public notice; or, for any violation of the general standards of conduct set forth in section 601 of this Code or of the standards of professional conduct of any bar of which such attorney-at-law is a member, it may (1) issue a private reprimand, (2) issue a public reprimand, (3) initiate disciplinary proceedings as provided in subsection (e) hereof, or (4) refer the matter for disciplinary action to the appropriate authority in the State, Territory, Commonwealth, or Possession, or the District of Columbia, in which the attorney is licensed to practice law.

(c) **COMMITTEE POWERS.**—The Committee shall have the power to promulgate rules and regulations, administer oaths and affirmations, issue subpoenas for the attendance of witnesses and the production of relevant evidence, establish procedures, conduct nonpublic hearings, and require the submission of relevant information from any agency.

(d) **ASSISTANCE.**—The Director of the Office of Legal Services and Procedure established pursuant to Title III of this Code shall provide the Committee with such facilities and services as the Committee may reasonably request.

(e) **DISCIPLINARY PROCEEDINGS.**—The United States district court of the judicial district in which an attorney-at-law is principally engaged in the practice of law shall have jurisdiction to hear and determine disciplinary proceedings instituted by the Committee against such attorney-at-law and to reprimand or to suspend or disbar him from practice before all agencies for violation of the general standards of conduct set forth in section 601 of this Code, or of the standards of professional conduct of any bar of which the attorney is a member.

(f) **AGENCY ACTION.**—For violation of the general standards of conduct set forth in section 601 of this Code, or for violation of such other standards of conduct as the agency in the public interest may prescribe by rule, any agency may suspend, for a period of not to exceed one year, the right of an attorney-at-law to appear before that agency, or to represent before it any public or private person, party, or organization, including the United States or any agency thereof. The United States District Court for the District of Columbia shall have jurisdiction to review in a subsequent trial of the law and the facts de novo any such order of suspension issued by the agency.

(g) **NOTIFICATION.**—The appropriate authority of every State, Territory, Commonwealth, or Possession of the United States, or of the District of Columbia, in which an attorney-at-law is licensed to practice law, shall be notified (1) by the Committee of any public reprimand issued by the Committee against such attorney, (2) by the agency of any order of suspension entered by the agency against such attorney,

and (3) by the United States district court of any reprimand, suspension, or disbarment entered by the court against such attorney in any proceeding instituted by the Committee.

#### REPRESENTATION BY PERSONS OTHER THAN ATTORNEYS-AT-LAW

SEC. 604. (a) PERSONS ENTITLED.—Individuals other than attorneys-at-law may be authorized by any agency to appear for or represent a public or private person, party, or organization before it, so long as and to the extent that such agency (1) shall find such representation appropriate and desirable in the public interest, as well as in the interest to the parties to agency proceedings, (2) is not otherwise precluded by law from so doing, and (3) provides by general rules for such representation. The agency may make such investigation or examination as it deems necessary to determine that the applicant possesses necessary competence and understanding of ethical responsibilities and is of good moral character and repute. Nothing contained in this Code shall be construed as authorizing persons not members of the bar to practice law or to hold themselves out, impliedly or expressly, as authorized so to do.

(b) DISCIPLINE.—Any agency before which a person other than an attorney-at-law appears for or represents any public or private person, party, or organization shall have authority to revoke or suspend the privilege of representation by such person before the agency for violation of the general standards of conduct set forth in section 601 of this Code, of subsection (a) hereof, or of such other standards of conduct as the agency may in the public interest prescribe by rule.

(c) JUDICIAL REVIEW.—An order revoking or suspending the privilege of representation extended to any such person by rule of the agency shall be reviewable by the United States District Court for the District of Columbia in a subsequent trial of the facts and the law de novo.

### TITLE VII—GENERAL PROVISIONS

#### CONSTRUCTION AND EFFECT

SEC. 700. Nothing in this Code shall be held to diminish the constitutional rights of any person or to limit or repeal any additional requirements imposed by statute or otherwise recognized by law. Except as otherwise recognized by law, all requirements or privileges relating to evidence or procedure shall apply equally to agencies and persons. Every agency shall have all the powers necessary to enable it to carry out the provisions of this Code, including the authority to make and enforce rules thereunder. The affirmative requirements and specific prohibitions of this Code shall be broadly construed, and exemptions from, and exceptions to, this Code shall be narrowly construed.

#### PENALTIES

SEC. 701. (a) FORFEITURES.—A claim against the United States before any agency thereof shall be forfeited to the United States by any person who corruptly practices or attempts to practice any fraud against the United States in the proof, statement, establishment, or allowance of such claim. In such cases, the agency shall specifically find such fraud or attempt and incorporate an order of forfeiture in its decision.

(b) CRIMINAL PENALTIES.—The provisions of sections 287, 1001, 1621, and 1622, title 18, United States Code, shall be applicable in agency proceedings instituted in accordance with the provisions of this Code.

#### SEPARABILITY

SEC. 702. If any provision of this Code or the application thereof to any person or circumstance is held invalid, the remainder of this Code and the application of such provision to other persons or circumstances shall not be affected thereby.

#### EFFECTIVE DATE

SEC. 703. This Code shall take effect on the 180th day after the date of its enactment. No procedural requirement herein provided for shall be mandatory as to any agency proceeding initiated prior to the effective date of such requirement.

### Model State Administrative Procedure Act

(The following bill, known as the MODEL STATE ADMINISTRATIVE PROCEDURE ACT, was prepared by the National Conference of Commissioners on Uniform State Laws and was adopted by the Conference at its annual meeting in October, 1946. It is made available by the conference as an aid to state legislatures preparing revisions of their administrative procedure legislation.)

AN ACT concerning procedure of state administrative agencies and review of their determinations.

*Be it enacted.* . . .

#### SECTION 1. (*Definitions.*)

For the purpose of this Act:

(1) "Agency" means any state [board, commission, department, or officer], authorized by law to make rules or to adjudicate contested cases, except those in the legislative or judicial branches, and except . . . [here insert the names of any agencies such as the parole boards of certain states, which, though authorized to hold hearings, exercise purely discretionary functions].

(2) "Rule" includes every regulation, standard, or statement of policy or interpretation of general application and future effect, including the amendment or repeal thereof, adopted by an agency, whether with or without prior hearing, to implement or make specific the law enforced or administered by it or to govern its organization or procedure, but does not include regulations concerning only the internal management of the agency and not directly affecting the rights of or procedures available to the public.

(3) "Contested case" means a proceeding before an agency in which the legal rights, duties, or privileges of specific parties are required by law or constitutional right to be determined after an agency hearing.

#### SECTION 2. (*Adoption of Rules.*)

In addition to other rule-making requirements imposed by law:

(1) Each agency shall adopt rules governing the formal and informal procedures prescribed or authorized by this act. Such rules shall include rules of practice before the agency, together with forms and instructions.

(2) To assist interested persons dealing with it, each agency shall so far as deemed practicable supplement its rules with descriptive statements of its procedures.

(3) Prior to the adoption of any rule authorized by law, or the amendment or repeal thereof, the adopting agency shall so far as practicable, publish or otherwise circulate notice of its intended action and afford interested persons opportunity to submit data or views orally or in writing.

SECTION 3. (*Filing and Taking Effect of Rules.*)

(1) Each agency shall file forthwith in the office of the [Secretary of State] a certified copy of each rule adopted by it, including all rules now in effect. The [Secretary of State] shall keep a permanent register of such rules open to public inspection.

(2) Each rule hereafter adopted shall become effective upon filing, unless a later date is required by statute or specified in the rule.

SECTION 4. (*Publication of Rules.*)

(1) The [Secretary of State] shall, as soon as practicable after the effective date of this act, compile, index, and publish all rules adopted by each agency and remaining in effect. Compilations shall be supplemented or revised as often as necessary [and at least once every two years].

(2) The [Secretary of State] shall publish a [monthly] bulletin in which he shall set forth the text of all rules filed during the preceding [month], excluding rules in effect upon the adoption of this act.

(3) The [Secretary] may in his discretion omit from the bulletin or the compilation rules the publication of which would be unduly cumbersome, expensive or otherwise inexpedient, if such rules are made available in printed or processed form on application to the adopting agency, and if the bulletin or compilation contains a notice stating the general subject matter of the rules so omitted and stating how copies thereof may be obtained.

(4) Bulletins and compilations shall be made available upon request to [officials of this state] free of charge, and to other persons at a price fixed by the [Secretary of State] to cover publication and mailing costs.

SECTION 5. (*Petition for Adoption of Rules.*)

Any interested person may petition an agency requesting the promulgation, amendment, or repeal of any rule. Each agency shall prescribe by rule the form for such petitions and the procedure for their submission, consideration, and disposition.

SECTION 6. (*Declaratory Judgment on Validity of Rules.*)

(1) The validity of any rule may be determined upon petition for a declaratory judgment thereon addressed to the (District Court) of . . . County, when it appears that the rule, or its threatened application, interferes with or impairs, or threatens to interfere with or impair, the legal rights or privileges of the petitioner. The agency shall be made a party to the proceeding. The declaratory judgment may be rendered whether or not the petitioner has first requested the agency to pass upon the validity of the rule in question.

(2) The court shall declare the rule invalid if it finds that it violates constitutional provisions or exceeds the statutory authority of the agency or was adopted without compliance with statutory rule-making procedures.

SECTION 7. (*Petition for Declaratory Rulings by Agencies.*)

On petition of any interested person, any agency may issue a declara-

tory ruling with respect to the applicability to any person, property, or state of facts of any rule or statute enforceable by it. A declaratory ruling, if issued after argument and stated to be binding, is binding between the agency and the petitioner on the state of facts alleged, unless it is altered or set aside by a court. Such a ruling is subject to review in the [District Court] in the manner hereinafter provided for the review of decisions in contested cases. Each agency shall prescribe by rule the form for such petitions and the procedure for their submission, consideration, and disposition.

SECTION 8. (*Contested Cases; Notice, Hearing, Records.*)

In any contested case all parties shall be afforded an opportunity for hearing after reasonable notice. The notice shall state the time, place, and issues involved, but if, by reason of the nature of the proceeding, the issues cannot be fully stated in advance of the hearing, or if subsequent amendment of the issues is necessary, they shall be fully stated as soon as practicable, and opportunity shall be afforded all parties to present evidence and argument with respect thereto. The agency shall prepare an official record, which shall include testimony and exhibits, in each contested case, but it shall not be necessary to transcribe shorthand notes unless requested for purposes of rehearing or court review. Informal disposition may also be made of any contested case by stipulation, agreed settlement, consent order, or default. Each agency shall adopt appropriate rules of procedure for notice and hearing in contested cases.

SECTION 9. (*Rules of Evidence: Official Notice.*)

In contested cases:

(1) Agencies may admit and give probative effect to evidence which possesses probative value commonly accepted by reasonably prudent men in the conduct of their affairs. They shall give effect to the rules of privilege recognized by law. They may exclude incompetent, irrelevant, immaterial, and unduly repetitious evidence.

(2) All evidence, including records and documents in the possession of the agency of which it desires to avail itself, shall be offered and made a part of the record in the case, and no other factual information or evidence shall be considered in the determination of the case. Documentary evidence may be received in the form of copies or excerpts, or by incorporation by reference.

(3) Every party shall have the right of cross-examination of witnesses who testify, and shall have the right to submit rebuttal evidence.

(4) Agencies may take notice of judicially cognizable facts and in addition may take notice of general, technical, or scientific facts within their specialized knowledge. Parties shall be notified either before or during hearing, or by reference in preliminary reports or otherwise, of the material so noticed, and they shall be afforded an opportunity to contest the facts so noticed. Agencies may utilize their experience, technical competence, and specialized knowledge in the evaluation of the evidence presented to them.

SECTION 10. (*Examination of Evidence by Agency.*)

Whenever in a contested case a majority of the officials of the agency who are to render the final decision have not heard or read the evidence, the decision, if adverse to a party to the proceeding other than the agency itself, shall not be made until a proposal for decision, including findings of fact and conclusions of law, has been served upon the parties, and an opportunity has been afforded to each party adversely affected

to file exceptions and present argument to a majority of the officials who are to render the decision, who shall personally consider the whole record or such portions thereof as may be cited by the parties. [This section shall not apply to the following agencies .....].

SECTION 11. (*Decisions and Orders.*)

Every decision and order adverse to a party to the proceeding, rendered by an agency in a contested case, shall be in writing or stated in the record and shall be accompanied by findings of fact and conclusions of law. The findings of fact shall consist of a concise statement of the conclusions upon each contested issue of fact. Parties to the proceeding shall be notified of the decision and order in person or by mail. A copy of the decision and order and accompanying findings and conclusions shall be delivered or mailed upon request to each party or to his attorney of record.

SECTION 12. (*Judicial Review of Contested Cases.*)

(1) Any person aggrieved by a final decision in contested case, whether such decision is affirmative or negative in form, is entitled to judicial review thereof under this act [but nothing in this section shall be deemed to prevent resort to other means of review, redress, relief or trial *de novo*, provided by law].

(2) Proceedings for review shall be instituted by filing a petition in the [District Court] within [thirty] days after the service of the final decision of the agency. Copies of the petition shall be served upon the agency and all other parties of record. [In the manner provided by .....]. The court, in its discretion, may permit other interested persons to intervene.

(3) The filing of the petition shall not stay enforcement of the agency decision; but the agency may do so, or the reviewing court may order a stay upon such terms as it deems proper.

(4) Within [thirty] days after service of the petition, or within such further time as the court may allow, the agency shall transmit to the reviewing court the original or a certified copy of the entire record of the proceeding under review; but, by stipulation of all parties to the review proceeding, the record may be shortened. Any party unreasonably refusing to stipulate to limit the record may be taxed by the court for the additional costs. The court may require or permit subsequent corrections or additions to the record when deemed desirable.

(5) If, before the date set for hearing, application is made to the court for leave to present additional evidence to the issues in the case, and it is shown to the satisfaction of the court that the additional evidence is material and that there were good reasons for failure to present it in the proceeding before the agency, the court may order that the additional evidence be taken before the agency upon such conditions as the court deems proper. The agency may modify its findings and decision by reason of the additional evidence and shall file with the reviewing court, to become a part of the record, the additional evidence, together with any modification or new findings or decision.

(6) The review shall be conducted by the court without a jury and shall be confined to the record, except that in cases of alleged irregularities in procedure before the agency, not shown in the record, testimony thereon may be taken in the court. The court shall, upon request, hear oral argument and receive written briefs.

(7) The court may affirm the decision of the agency or remand the case for further proceedings; or it may reverse or modify the decision



if the substantial rights of the petitioners may have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

- (a) in violation of constitutional provisions; or
  - (b) in excess of the statutory authority or jurisdiction of the agency;
- or
- (c) made upon unlawful procedure; or
  - (d) affected by other error of law; or
  - (e) unsupported by competent, material, and substantial evidence in view of the entire record as submitted; or
  - (f) arbitrary or capricious.

[SECTION 13. (*Appeals.*)

An aggrieved party may secure a review of any final judgment of the [District Court] under this act by appeal to the [Supreme Court]. Such appeal shall be taken in the manner provided by law for appeals from the [District Court] in other civil cases.]

[SECTION 14. (*Constitutionality.*)

If any provision of this act or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are declared to be severable.]

SECTION 15. (*Repeal.*)

All acts or parts of acts which are inconsistent with the provisions of this act are hereby repealed, but such repeal shall not affect pending proceedings.

SECTION 16. (*Time of Taking Effect.*)

This act shall take effect . . . <sup>20</sup>

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<sup>20</sup> In recent years several state legislatures have enacted statutes, based in whole or in part on the Model Act, prescribing standards of administrative procedure. The list of such states includes:

(1) *North Dakota—Uniform Practice Act.* Adopted in 1941, this act was the first of the general remedial acts. It specified basic procedures, both for rule-making and for adjudication. See North Dakota Laws, 1941, ch. 240; Rev. Code 1943, §§ 28-3201 to 28-3222. See also Hoyt, "North Dakota Leads in Administrative Law Field," 25 J. Am. Jud. Soc. 114 (1941).

(2) *Wisconsin—Uniform Administrative Procedure Act.* Adopted in 1943, this act was modeled closely on a tentative draft of a model bill being prepared by the National Conference of Commissioners on Uniform State Laws. In the Wisconsin legislature it was acclaimed as an important and significant procedural reform. See Wisconsin Laws of 1943, ch. 375. For a careful discussion of the measure, see Hoyt, "Wisconsin's Administrative Procedure Act," Wis. L. Rev. (1944), pp. 214-239.

(3) *North Carolina—Revocation of License Act.* Adopted in 1939, and extensively amended in 1953, this act prohibits the cancellation of certain specified types of licenses without prior notice and hearing, and provides for appeal from cancellation orders to the superior courts. See North Carolina General Statutes, §§ 150-1 to 150-34.

(4) *Ohio—Uniform Administrative Procedure Act.* Also adopted in 1943 on recommendation of a special administrative law commission created by the preceding legislature. The act prescribes procedure for licensing agencies—licensing being broadly defined to include all orders determining "the rights, duties, privileges, benefits, or legal relationships of a specified person or persons."



## SECTION 7. OTHER MEANS OF CONTROL OF ADMINISTRATIVE DISCRETION

Earlier in this chapter, reference has been made to three methods which have been employed to place appropriate limits on administrative discretion, viz: (1) limiting delegations of authority by statutory

See Ohio General Code (1943) §§ 154-161 to 154-173. For a description of the work of the Ohio Administrative Commission that drafted the bill, see 15 Ohio State Bar Association Reports 581 (1943).

(5) *Virginia—Administrative Agency Act.* This act, adopted in 1944, contains a general and comprehensive treatment of the entire administrative process. See ch. 160, Acts of 1944, as amended by ch. 234, Acts of 1946.

(6) *California—Administrative Procedure Act,* Gov. Code, Title 2, Div. 3, Part 1, chaps. 4 and 5, effective September 9, 1953. Previously, three separate acts relating to the principal aspects of procedure and review had been adopted in 1945, the result of two years of careful and thorough study by the California Judicial Council. The Council took advantage of previous studies and legislation, with the result that the provisions are exceedingly well-considered and effectively drafted. See the Administrative Procedure Act, Stats. 1945, ch. 867; Government Code, Tit. 2, Div. 3, Pt. 1. The Division of Administrative Procedure Act, Stats. 1945, ch. 869; Business and Professions Code, Secs. 110.5, 110.6; and the Judicial Review Procedure Act, Stats. 1945, ch. 868; Code Civil Procedure, § 1094.5.

(7) *Illinois—Administrative Revenue Act.* This act was adopted in 1945 and is limited to provisions concerning judicial review of administrative action. See Laws of Illinois (1945), p. 1144.

(8) *Pennsylvania—Administrative Agency Law.* This act, adopted in 1945 and amended in 1951, is a comprehensive act, including provisions for filing and publication of administrative rules as well as provisions concerning adjudication procedure and judicial review. See 71 Purdon Penn. Stat. Sec. 1710.1.

(9) *Missouri—Administrative Procedure and Review Act.* In 1945, Missouri enacted a comprehensive act, following the adoption of constitutional amendments designed to place suitable curbs and limits on administrative discretion. An interesting and highly informative account of the Missouri experience, by Richard D. Shewmaker of the St. Louis Bar, is printed with the provisions of the statute, 37 Vernon's Annotated Missouri Statutes, ch. 536, p. 145.

(10) *Indiana—Administrative Adjudication Act.* Indiana (which had previously adopted certain provisions applicable to administrative rule-making) in 1947 enacted provisions regulating adjudicatory procedures of the agencies, and providing for judicial review. Burns Indiana Statutes, ch. 30, Sec. 63.3001.

(11) *Michigan—Administrative Procedure Act.* Michigan in 1952 adopted a statute which follows closely the provisions of the Model State Act and imposes considerably more rigorous provisions as to the publication of administrative rules. Mich. Stat. Ann. §§ 3.560(21.1) to (21.10).

(12) *Massachusetts—Fair Administrative Procedure Act.* An excellently drafted, comprehensive and far-reaching statute was adopted by Massachusetts in 1954. Mass. Acts, 1954, ch. 681.

Discussions of some of the problems connected with legislative control of the procedures of state administrative agencies are found in: Harris: "Administrative Practice and Procedure: Comparative State Legislation," 6 Okla. L. Rev. 29 (1953); Schwartz, "The Model State Administrative Procedure Act—Analysis and Critique," 7 Rutg. L. Rev. 431 (1953).

standards controlling the agency's scope of discretion; (2) vesting supervisory control in other governmental organs; (3) adopting codes of fair administrative procedure.

None of these three approaches has fully solved the problem. Various other means have been considered from time to time; and doubtless the future will see new sanctions employed to achieve the desired ends.

Some intriguing suggestions are contained in the following excerpt from the Report of the Hoover Commission Task Force on Legal Services and Procedure, pp. 30-32 (1955) :

*"Limitations of Authority.*

"Positive limitations should be imposed, by statute, upon the exercise of administrative powers, authority, or discretion, to the end that statutes are faithfully executed, the rights of private parties are fully protected, and the administration of matters committed to agency action is prompt, fair, and efficient.

*"Compliance with the Intent of Controlling Statutes.*—The Administrative Procedure Act does not cover adequately the compliance by agencies with controlling statutes. In the view of the task force, no sanction should be imposed, or substantive rule or order issued, except within the intent, as well as within the letter, of applicable statutes and the limitations of jurisdiction, powers, and authority prescribed by law.

*"Notice by Rule.*—It is a manifest hardship to subject an individual to a penalty, or other sanction, for continuing to do that which for long was considered by him, and others, to be permissible under the law. Unfortunately, situations have arisen where, as a result of an adjudicatory proceeding initiated by an agency, a sanction has been imposed upon an individual for engaging in such conduct, even though no statute or rule had been enacted or promulgated specifically condemning it. The task force does not believe that a sanction should be imposed upon a person for pursuing a normal, customary, or previously acceptable course of conduct, unless such conduct has been proscribed or restricted by statute or by rule.

*"Good Faith Reliance.*—A clear inequity arises when persons rely in good faith upon authoritative agency opinions, only to be informed in subsequent proceedings that the opinion is not binding upon the agency. The task force believes sanctions should not be imposed for an act done or omitted in good faith by a person in conformity with, or in reliance upon, a rule or written advisory statement of the agency obtained by such person without fraud or material misrepresentation, notwithstanding that, after such act or omission, the rule or statement is declared invalid by the agency. In order that persons may be informed upon whose representations they may properly rely, each agency should by rule designate the classes of officials who are authorized to issue advisory statements binding upon the agency.

*"Repetitious Agency Proceedings.*—The private citizen who is required to litigate his rights before an administrative agency must pay the full cost of his own representation. He may lose his rights if he is not able to sustain the heavy financial expenses of protracted proceedings. The same handicap does not usually exist on the Government side. In the opinion of the task force, no person should be required to participate in more than one hearing in any agency adjudication except on remand

by an agency to a presiding officer, or on remand by a reviewing court to the agency, or upon stipulation of all parties to the proceeding.

*"Publicity.*—The release to the press of charges to be filed against a private citizen in any proceeding, accompanied by unnecessary comments reflecting upon his reputation, may be as damaging to him as an adverse decision by a court or agency. Reasonable measures should be taken to prevent such publicity, wherever it occurs. Departments and agencies should not be permitted to release publicity for the purpose of discrediting a person under investigation or a party to an agency proceeding. Where this happens, a reviewing court should be empowered to set aside the agency action for prejudicial prejudging of the issues.

*"Indefinite Rules and Orders.*—No person could possibly be informed of more than the slightest portion of the flood of rules and orders pouring annually from administrative sources. The least that can be done to assist the private citizen in the intelligent protection of his rights is to assure that rules and orders are enforceable only within the literal, definite, and specific terms thereof. Every reviewing court should declare any rule or order unlawful if its terms are vague, indefinite, or uncertain in any material respect, or exceed the scope permissible upon the facts or record on which such agency action is requested to be made or sought to be justified.

*"Proceedings in Excess of Jurisdiction.*—It is a burdensome and costly process to require a person to go through a lengthy and protracted administrative proceeding when the agency is acting in excess of its constitutional or statutory jurisdiction or authority. It should be possible to obtain judicial protection from required participation in such agency proceedings, and the task force so recommends."

Still another means of controlling the exercise of administrative discretion in rule-making deserves mention. It is the device of requiring that administrative rules and regulations be laid before the legislature for approval or disapproval. Several variants of this policy are found. It may be required only that the regulations be laid before the legislature for its information. As to this requirement, there is little room for objection, although there is room for considerable skepticism as to the effectiveness of such procedure in encouraging legislative examination of the administrative activity. A more effective way of accomplishing this result would be to require the annual submission of detailed reports as to the agency's activities. Sometimes it is provided that the regulations shall be noticed for legislative review and possible amendment or annulment within a specified period. While of course the legislature always has this power, nevertheless such provision does have a very real effect, in that it brings the regulations before the legislative body, and facilitates the making of an attack by interested parties on the challenged regulation.

This practice has long been followed in England. Under the English practice, a Statutory Instruments Committee in the House of Commons (or its counterpart in the House of Lords) examines administrative regulations to determine whether the special attention of Parliament should be directed thereto on the grounds (among others) that the regu-

lation is not open to challenge in the courts, or appears to make unusual or unexpected use of the powers conferred, or purports to have unauthorized retrospective effect. The English experience under this legislation is reviewed in an article by J. A. G. Griffith, "Delegated Legislation—Some Recent Developments," 12 *Modern Law Review* 297 (1949).

In the United States, proposals for such legislative review of administrative rules have not enjoyed great popularity. They are not unknown, however. At least one Federal statute employed such a device: the Reorganization Act of 1939, 53 Stat. 561, 5 USCA 133 c-d. Some states have adopted legislation providing for review by appropriate committees of the state legislature of administrative rules, e. g., Connecticut (Sec. 285, Gen. Stat.); Michigan (Sec. 3.560-14, Mich. Stat. Ann.); and Nebraska (Sec. 84-904, Rev. Stat.).

## **PART II**

### **PROCEDURE BEFORE ADMINISTRATIVE TRIBUNALS**

#### **CHAPTER III**

##### **NOTICE AND OPPORTUNITY FOR HEARING**

###### **SECTION 1. STATUTORY PROVISIONS**

Most statutes establishing administrative tribunals make provision in a general way for the hearings to be afforded and for the notices to be given interested parties. Such provisions vary widely in detail but in general portent they bear similarity to each other. Certain typical provisions follow:

Federal Trade Commission Act (15 USCA 45 (b)). Whenever the Commission shall have reason to believe that any . . . person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the Commission requiring such person, partnership, or corporation to cease and desist from the violation of the law so charged in said complaint. Any person, partnership, or corporation may make application, and upon good cause shown may be allowed by the Commission to intervene and appear in said proceeding by counsel or in person.

Federal Communications Act (47 USCA 309 (a)). If upon examination of any application for a station license or for the renewal or modification of a station license the Commission shall determine that public interest, convenience, or necessity would be served by the granting thereof, it shall authorize the issuance, renewal, or modification thereof in accordance with said finding. In the event the Commission upon examination of any such application does not reach such decision with respect thereto, it shall notify the applicant thereof, shall fix and give notice of a time and place for hearing thereon, and shall afford such applicant an opportunity to be heard under such rules and regulations as it may prescribe.

National Labor Relations Act (29 USCA 160 (b)). Whenever it is charged that any person has engaged in or is engaging in any such un-

fair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. In any such proceeding the rules of evidence prevailing in courts of law or equity shall not be controlling.

Such statutory provisions reflect a conviction that as a matter of principle, parties to be affected by administrative action should have a full opportunity to present their views before any official action is taken.

Typical of the modern trend are the provisions of the Federal Administrative Procedure Act, 60 Stat. 237, 5 USCA 1001-1011 [e. g., Sec. 4 (a), relating to notice and hearing in rule-making proceedings; and Sec. 5 (a), relating to the same topic in adjudicatory proceedings]. The text of these provisions has been examined in the foregoing chapter. How these statutory requirements have been interpreted and applied by the courts is illustrated by the two following cases.

**Wong Yang Sung v. McGrath, 1950. 339 U. S. 33, 94 L. Ed. 616, 70 S. Ct. 445.**

MR. JUSTICE JACKSON delivered the opinion of the court.

This habeas corpus proceeding involves a single ultimate question—whether administrative hearings in deportation cases must conform to requirements of the Administrative Procedure Act of June 11, 1946, 60 Stat. 237, 5 USCA 1001 et seq.

Wong Yang Sung, native and citizen of China, was arrested by immigration officials on a charge of being unlawfully in the United States through having over-stayed shore leave as one of a shipping crew. A hearing was held before an immigrant inspector who recommended deportation. The Acting Commissioner approved; and the Board of Immigration Appeals affirmed.

Wong Yang Sung then sought release from custody by habeas corpus proceedings in District Court for the District of Columbia, upon the sole ground that the administrative hearing was not conducted in conformity with §§ 5 and 11 of the Administrative Procedure Act. The Government admitted noncompliance, but asserted that the Act did not apply. The court, after hearing, discharged the writ and remanded the prisoner to custody, holding the Administrative Procedure Act inapplicable to deportation hearings. 80 F. Supp. 235. The Court of

Appeals affirmed. 84 U. S. App. D. C. 419, 174 F. 2d 158. Prisoner's petition for certiorari was not opposed by the Government and, because the question presented has obvious importance in the administration of the immigration laws, we granted review. 338 U. S. 812.

## I

The Administrative Procedure Act of June 11, 1946, *supra*, is a new, basic and comprehensive regulation of procedures in many agencies, more than a few of which can advance arguments that its generalities should not or do not include them. Determination of questions of its coverage may well be approached through consideration of its purposes as disclosed by its background.

Multiplication of federal administrative agencies and expansion of their functions to include adjudications which have serious impact on private rights has been one of the dramatic legal developments of the past half-century. Partly from restriction by statute, partly from judicial self-restraint, and partly by necessity—from the nature of their multitudinous and semilegislative or executive tasks—the decisions of administrative tribunals were accorded considerable finality, and especially with respect to fact finding. The conviction developed, particularly within the legal profession, that this power was not sufficiently safeguarded and sometimes was put to arbitrary and biased use.

. . .

## II

Of the several administrative evils sought to be cured or minimized, only two are particularly relevant to issues before us today. One purpose was to introduce greater uniformity of procedure and standardization of administrative practice among the diverse agencies whose customs had departed widely from each other. We pursue this no further than to note that any exception we may find to its applicability would tend to defeat this purpose.

More fundamental, however, was the purpose to curtail and change the practice of embodying in one person or agency the duties of prosecutor and judge. The President's Committee on Administrative Management voiced in 1937 the theme which, with variations in language, was reiterated throughout the legislative history of the Act. The Committee's report, which President Roosevelt transmitted to Congress with his approval as "a great document of permanent importance," said:

" . . . the independent commission is obliged to carry on judicial functions under conditions which threaten the impartial performance of that judicial work. The discretionary work of the administrator is merged with that of the judge. Pressures and influences properly enough directed toward officers responsible for formulating and administering policy constitute an unwholesome atmosphere in which to adjudicate private rights. But the mixed duties of the commissions render escape from these subversive influences impossible.

"Furthermore, the same men are obliged to serve both as prosecutors and as judges. This not only undermines judicial fairness; it weakens public confidence in that fairness. Commission decisions affecting private rights and conduct lie under the suspicion of being rationalizations of the preliminary findings which the commission, in the role of prosecutor, presented to itself." *Administrative Management in the Government of the United States, Report of the President's Committee on Administrative Management*, 36-37 (1937).

The Committee therefore recommended a redistribution of functions within the regulatory agencies. "[I]t would be divided into an administrative section and a judicial section" and the administrative section "would formulate rules, initiate action, investigate complaints . . ." and the judicial section "would sit as an impartial, independent body to make decisions affecting the public interest and private rights upon the basis of the records and findings presented to it by the administrative section." *Id.* at 37.

. . .

### III

Turning now to the case before us, we find the administrative hearing a perfect exemplification of the practices so unanimously condemned.

This hearing, which followed the uniform practice of the Immigration Service, was before an immigrant inspector, who, for purposes of the hearing, is called the "presiding inspector." Except with consent of the alien, the presiding inspector may not be the one who investigated the case. 8 C. F. R. 150.6(b). But the inspector's duties include investigation of like cases; and while he is today hearing cases investigated by a colleague, tomorrow his investigation of a case may be heard before the inspector whose case he passes on today. An "examining inspector" may be designated to conduct the prosecution, 8 C. F. R. 150.6(n), but none was in this case; and, in any event, the examining inspector also has the same mixed prosecutive and hearing functions. The presiding inspector, when no examining inspector is present, is required to "conduct the interrogation of the alien and the witnesses in behalf of the Government and shall cross-examine the alien's witnesses and present such evidence as is necessary to support the charges in the warrant of arrest." 8 C. F. R. 150.6(b). It may even become his duty to lodge an additional charge against the alien and proceed to hear his own accusation in like manner. 8 C. F. R. 150.6(1). Then, as soon as practicable, he is to prepare a summary of the evidence, proposed findings of fact, conclusions of law, and a proposed order. A copy is furnished the alien or his counsel, who may file exceptions and brief, 8 C. F. R. 150.7, whereupon the whole is forwarded to the Commissioner. 8 C. F. R. 150.9.

The Administrative Procedure Act did not go so far as to require a complete separation of investigating and prosecuting functions from adjudicating functions. But that the safeguards it did set up were in-



tended to ameliorate the evils from the commingling of functions as exemplified here is beyond doubt. And this commingling, if objectionable anywhere, would seem to be particularly so in the deportation proceeding, where we frequently meet with a voteless class of litigants who not only lack the influence of citizens, but who are strangers to the laws and customs in which they find themselves involved and who often do not even understand the tongue in which they are accused. Nothing in the nature of the parties or proceedings suggests that we should strain to exempt deportation proceedings from reforms in administrative procedure applicable generally to federal agencies.

Nor can we accord any weight to the argument that to apply the Act to such hearings will cause inconvenience and added expense to the Immigration Service. Of course it will, as it will to nearly every agency to which it is applied. But the power of the purse belongs to Congress, and Congress has determined that the price for greater fairness is not too high. The agencies, unlike the aliens, have ready and persuasive access to the legislative ear and if error is made by including them, relief from Congress is a simple matter.

This brings us to contentions both parties have advanced based on the pendency in Congress of bills to exempt this agency from the Act. Following an adverse decision, the Department asked Congress for exempting legislation, which appropriate committees of both Houses reported favorably but in different form and substance. Congress adjourned without further action. The Government argues that Congress knows that the Immigration Service has construed the Act as not applying to deportation proceedings, and that it "has taken no action indicating disagreement with that interpretation"; that therefore it "is at least arguable that Congress was prepared to specifically confirm the administrative construction by clarifying legislation." We do not think we can draw that inference from incompleting steps in the legislative process. Cf. *Helvering v. Hallok*, 309 U. S. 106, 119-120.

On the other hand, we will not draw the inference, urged by petitioner, that an agency admits that it is acting upon a wrong construction by seeking ratification from Congress. Public policy requires that agencies feel free to ask legislation which will terminate or avoid adverse contentions and litigations. We do not feel justified in holding that a request for and failure to get in a single session of Congress clarifying legislation on a genuinely debatable point of agency procedure admits weakness in the agency's contentions. We draw, therefore, no inference in favor of either construction of the Act—from the Department's request for legislative clarification, from the congressional committees' willingness to consider it, or from Congress' failure to enact it.

We come, then, to examination of the text of the Act to determine whether the Government is right in its contentions: first, that the general scope of § 5 of the Act does not cover deportation proceedings; and,

second, that even if it does, the proceedings are excluded from the requirements of the Act by virtue of § 7.

#### IV

The Administrative Procedure Act, § 5, establishes a number of formal requirements to be applicable "in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing." The argument here depends upon the words "adjudication required by statute." The Government contends that there is no express requirement for any hearing or adjudication in the statute authorizing deportation, and that this omission shields these proceedings from the impact of § 5. Petitioner, on the other hand, contends that deportation hearings, though not expressly required by statute, are required under the decisions of this Court, and the proceedings, therefore, are within the scope of § 5.

Both parties invoke many citations to legislative history as to the meaning given to these key words by the framers, advocates or opponents of the Administrative Procedure Act. Because § 5 in the original bill applied to hearings required "by law," because it was suggested by the Attorney General that it should be changed to "required by statute or Constitution," and because it finally emerged "required by statute," the Government argues that the section is intended to apply only when explicit statutory words granting a right to adjudication can be pointed out. Petitioner on the other hand cites references which would indicate that the limitation to statutory hearing was merely to avoid creating by inference a new right to hearings where no right existed otherwise. We do not know. The legislative history is more conflicting than the text is ambiguous.

But the difficulty with any argument premised on the proposition that the deportation statute does not require a hearing is that, without such hearing, there would be no constitutional authority for deportation. The constitutional requirement of procedural due process of law derives from the same source as Congress' power to legislate and, where applicable, permeates every valid enactment of that body. It was under compulsion of the Constitution that this Court long ago held that an antecedent deportation statute must provide a hearing at least for aliens who had not entered clandestinely and who had been here some time even if illegally. The Court said:

"This is the reasonable construction of the acts of Congress here in question, and they need not be otherwise interpreted. In the case of all acts of Congress, such interpretation ought to be adopted as, without doing violence to the import of the words used, will bring them into harmony with the Constitution." The Japanese Immigrant Case, 189 U. S. 86, 101.

We think that the limitation to hearings "required by statute" in § 5 of the Administrative Procedure Act exempts from that section's ap-

plication only those hearings which administrative agencies may hold by regulation, rule, custom, or special dispensation; not those held by compulsion. We do not think the limiting words render the Administrative Procedure Act inapplicable to hearings, the requirement for which has been read into a statute by the Court in order to save the statute from invalidity. They exempt hearings of less than statutory authority, not those of more than statutory authority. We would hardly attribute to Congress a purpose to be less scrupulous about the fairness of a hearing necessitated by the Constitution than one granted by it as a matter of expediency.

Indeed, to so construe the Immigration Act might again bring it into constitutional jeopardy. When the Constitution requires a hearing, it requires a fair one, one before a tribunal which meets at least currently prevailing standards of impartiality. A deportation hearing involves issues basic to human liberty and happiness and, in the present upheavals in lands to which aliens may be returned, perhaps to life itself. It might be difficult to justify as measuring up to constitutional standards of impartiality a hearing tribunal for deportation proceedings the like of which has been condemned by Congress as unfair even where less vital matters of property rights are at stake.

We hold that the Administrative Procedure Act, § 5, does cover deportation proceedings conducted by the Immigration Service.<sup>1</sup>

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**Hotch v. United States, Circuit Court of Appeals, Ninth Circuit, 1954, 212 F. (2d) 280.**

STEPHENS, Circuit Judge.

Steven V. Hotch was convicted of fishing in violation of a regulation of the Department of the Interior extending the period closed to commercial fishing on the Taku Inlet. In an opinion filed September 14, 1953, this court affirmed the conviction, holding that the cited regulation was within the scope of the authority delegated by statute, and that it applied to Hotch. See *Hotch v. United States*, 9 Cir., 1953, 208 F.2d 244. Subsequently, Hotch petitioned this court for a rehearing at which time he first raised the argument that the regulation was not effective since it had not been published in the Federal Register. As the petition raised a jurisdictional point, we entertained it and in a supplemental opinion, filed December 2, 1953, reversed the conviction on the ground that the regulation closing the Taku Inlet to commercial fishing from 6:00 P.M. Thursday of each week was ineffective since it had not been published in the Federal Register. *Hotch v. United States*, 9 Cir., 1953, 208 F.2d 249.

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<sup>1</sup> Among other law review comments on this decision, see 18 Geo. Wash. L. Rev. 557 (1950); 38 Geo. L. J. 659 (1950); 48 Mich. L. Rev. 1127 (1950); 25 N. Y. Univ. L. Rev. 638 (1950); 98 U. of Pa. L. Rev. 920 (1950).

The United States now petitions for a rehearing on the ground that publication was not necessary to make the regulation in issue effective against the defendant in this action since (as it is stated in the petition) the defendant had actual notice of the extended closed period.

Section 5 (a) of the Federal Register Act, Title 44 U.S.C.A. § 305, requires the publication of the Federal Register of, among other documents, such documents or classes of documents as may be required to be published by Act of Congress. Any such document which is not duly published is invalid. In 1946, Congress enacted the Administrative Procedure Act, 60 Stat. 237, 5 U.S.C.A. § 1001 et seq., in which it described certain classes of documents which it required to be published.

Section 4 (a) of the Administrative Procedure Act, Title 5 U.S.C.A. § 1003 (a), requires that:

"General notice of proposed rule making shall be published in the Federal Register (unless all persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law) . . . ."

And section 3 (a) (3), Title 5 U.S.C.A. § 1002 (a) (3) requires that:

"Every agency shall separately state and currently publish in the Federal Register . . . substantive rules adopted as authorized by law . . . ."

We quote from the Report of the House of Representatives Committee on the Judiciary in its statement on the substance of the Administrative Procedure Act:

"In the 'rule making' (that is, 'legislative') function it [the Administrative Procedure Act] provides that with certain exceptions agencies must publish notice and at least permit interested parties to submit their views in writing for agency consideration *before the issuance of general regulations* (sec. 4) [italics ours]." U. S. Code Congressional Service, 79th Congress, Second Session, 1946, p. 1195, at 1205.

The report goes on to state that hearings need not be held on a proposed regulation unless required by statute. But the important disclosure is that publication is a prerequisite to the *issuance* of a regulation.

The Congressional directive in regard to the procedure to be followed in the issuance of agency regulations must be strictly complied with, since the issuance of regulations is in effect an exercise of delegated legislative power. In the case before us, neither notice that a regulation extending the closed period on the Taku Inlet was to be issued, nor the proposed regulation itself, was published in the Federal Register. The failure to comply with either of the referred to provisions of the Administrative Procedure Act means that the procedure laid down by Congress for the implementation of agency rules and regulations has not been met.

. . . .

While the Administrative Procedure Act and the Federal Register Act are set up in terms of making information available to the public, the Acts are more than mere recording statutes whose function is solely to give constructive notice to persons who do not have actual notice of certain agency rules. The Acts set up the procedure which must be followed in order for agency rulings to be given the force of law. Unless the prescribed procedures are complied with, the agency (or administrative) rule has not been legally issued, and consequently it is ineffective.

The United States, in support of its argument that actual notice obviates the need for publication in the Federal Register, cites cases in which it has been held that publication gives constructive notice to all interested parties that a rule has been issued. However, the holdings in those cases do not support the conclusion that a required definite procedure in the establishment of a criminal offense is waived by personal notice that the legislative body having jurisdiction to legislate had intended to create the offense.

Under our system of law, no act is punishable as a crime unless it is specifically condemned by the common law or by a statutory enactment of the legislature. The Congress has here made it an unlawful offense against the United States to fish in "closed" waters, and has delegated the authority to determine which waters shall be closed to the Secretary of the Interior who, in turn, has subdelegated his authority. Since Congress could delegate its authority, it could also delegate the manner in which that authority is to be exercised. Therefore, the Administrative Procedure Act and the Federal Register Act must be read as a part of every Congressional delegation of authority, unless specifically excepted. Those Acts require publication, irrespective of actual notice, as a prerequisite to the *issuance* of a regulation making certain acts criminal. If notice of a proposed rule is not published in the Federal Register, at least thirty days prior to its issuance, or if good cause is not found and published for the immediate issuance of a rule, the rule cannot be legally issued; if the rule itself is not published, it follows that it has not been issued; and if a rule has not been issued, it has no force as law.

If certain acts have not been made crimes by duly enacted law, the knowledge of their contemplated administrative proscription cannot subject the informed person to criminal prosecution. While ignorance of the law is no defense, it is conversely true that a law which has *not* been duly enacted is not a law, and therefore a person who does not comply with its provisions cannot be guilty of any crime.

We hold that since neither the proposed regulation nor the regulation itself in the instant case were ever published, the regulation is not valid whether or not appellant had actual notice of its contents. Whether or not actual notice might be required in addition to publication in certain circumstances, we do not decide.

## SECTION 2. RULES OF PRACTICE

When an administrative tribunal performs a judicial or *quasi*-judicial function it is essential that a certain degree of regularity and precision of procedure be observed. This is necessary in order that the evidence of the contending parties may be fairly and fully presented, and in order that the tribunal may be adequately advised in regard to the opposing claims. In fact, certain procedural formalities are so thoroughly embedded in our system of administration of justice that we regard them as guaranteed by the due process of law provisions of our constitutions.

In view of these considerations, administrative tribunals exercising powers judicial in nature are normally well implemented with rules of procedure derived partly from the statutes themselves, and partly from the exercise of delegated rule-making power. Under such rules the tribunals proceed much as do the courts in passing upon the controversies lying within their respective jurisdictions.

The Interstate Commerce Commission, usually regarded as the patriarch among administrative tribunals in this country, furnishes a good illustration. Section 17 (1) of the Interstate Commerce Act (49 USCA 17) provides "that the Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice. The Commission shall have an official seal, which shall be judicially noticed. Any member of the Commission may administer oaths and affirmations and sign subpoenas. A majority of the Commission shall constitute a quorum for the transaction of business, except as may be otherwise herein provided, but no Commissioner shall participate in any hearing or proceeding in which he takes a pecuniary interest. The Commission may, from time to time, make or amend such general rules or orders as may be requisite for the order and regulation of proceedings before it, or before any division of the Commission, including forms of notices and the service thereof, which shall conform as near as may be to those in use in the courts of the United States. Any party may appear before the Commission or any division thereof and be heard in person or by attorney. Every vote and official act of the Commission, or of any division thereof, shall be entered of record, and its proceedings shall be public upon the request of any party interested."

Pursuant to the foregoing authority the Commission has promulgated a series of rules of procedure to be observed in matters brought before it. The text of the rules may be found in the Federal Register, or Code of Federal Regulations, and in the commercially published services dealing with the federal agencies. Examination of the rules is recommended, since they show the strong analogy between judicial proceedings and adjudicatory proceedings in the longer established and more mature agencies. Many of the other agencies have published comparable rules.

**SECTION 3. CONSTITUTIONAL REQUIREMENTS****Introductory Note**

The remaining cases in this chapter are concerned with the general question: In the absence of statute, under what circumstances will notice and hearing be required by the courts as a matter of constitutional necessity? As an analytical aid to assist the student in formulating his answer to this broad question, the cases are grouped in four categories: public safety, taxation, rule-making, licensing.

The following questions should be considered in comparing and evaluating this group of cases:

Does decision as to the constitutional necessity of notice and hearing depend in any important degree on the court's weighing of the public interest (as in facilitating the expeditious disposition of the affairs of government, such as collection of the public revenues, elimination of public danger, and the like) against the private interest (in making sure that no one's enjoyment of his property or methods of doing business will be interfered with, until he has had an opportunity to be heard in his own defense)?

If so, what are the factors which tip the balance one way or the other? Do the courts consider such matters as the substantiality of the property interests involved, the number of persons affected, the necessity of prompt governmental action, the distinction between the regulation of private business and the conduct of public business?

Do the courts look to see whether some substitute for formal notice and hearing (e. g., informal conferences, or scientific tests, or pecuniary refunds) will properly protect the interests involved?

Are the courts influenced by tradition in particular fields of administrative activity?

Is there a distinction between rule-making and adjudicatory proceedings?

Is decision affected by the existence of other safeguards, such as provisions for broad judicial review?

The constitutional principles which determine the necessity of notice and hearing in the United States have resulted in the courts in this country adopting a different approach to the problem from that of the courts in England, where there is no due process clause to stand guard. It is worth noting, however, that in England, too, according to some scholars, "a basic requirement of the process of administrative adjudication is that a person who will be adversely affected by an act or a decision of the administration shall be granted a hearing before he suffers detriment." The quotation is from an article by S. A. de Smith, "The Right to a Hearing in English Administrative Law," 68 Harv. L. Rev. 569 (1955). It is only fair to add, however, that English notions as to adequacy of notice and hearing are quite different in some respects from

those that prevail here, a conclusion that may be illustrated by the following brief review of some of the leading English cases.

In 1914 the House of Lords handed down its famous decision in *Local Government Board v. Arlidge*, [1915] A. C. 120. It seemed that in 1911, one Arlidge, the owner of a dwelling house which he used for rental purposes, was served with a closing order with respect to the house, the order having been issued by the Hampstead Borough Council under the Housing and Town Planning Act of 1909. The council had declared the dwelling house unfit for human habitation. The order was entered after an *ex parte* investigation and without notice and hearing. However, Arlidge was allowed an appeal to the Local Government Board which appeal he pursued in due course. In passing on the appeal the board acted partly upon evidence submitted at a public inquiry which was ordered, but partly, also, upon an *ex parte* report to the board by a government inspector. Neither the report nor the inspector was made available to the aggrieved party for refutation or cross-examination. In short, no semblance of a judicial hearing was afforded to the aggrieved Arlidge. He protested on account of this procedural deficiency. The case was ultimately carried to the House of Lords which finally held the closing order valid in spite of the lack of judicial refinement in the procedure followed. In doing so the Lords in effect announced as the general principle governing *quasi*-judicial proceedings in England that, when a statute confers *quasi*-judicial powers on administrative officials, they are not bound to follow the rules of procedure observed in the courts, but are at liberty to exercise their powers in accordance with the usual practice followed in the conduct of departmental affairs. The action must be in accord with fairness and equity, but judicial rules of procedure are not essential thereto.

The Arlidge case opinion was widely publicized, not to say criticized. It served to bring home to the British public the extent to which modern administrative law and its more informal procedural methods had invaded a common-law stronghold. For discussion of the case, see Dicey, "Development of Administrative Law in England," 31 L. Q. Rev. 148 (1915); Tennant, "Administrative Finality," 6 Can. Bar. Rev. 497 (1928); Pound, "Growth of Administrative Justice," 2 Wis. L. Rev. 321 (1924); 28 Harv. L. Rev. 198 (1914).

Another English case serves to illustrate the prevailing practice in a different field of administrative action. Under the Aliens Restriction Act of 1914 the Secretary of State for Home Affairs was empowered to order the deportation of aliens if he should deem it to be conducive to the public good. The Secretary made such an order in regard to one Venicoff, without affording a notice and hearing. It was held that, since the Secretary was acting in an executive rather than a judicial capacity, no hearing was required. *The King v. Inspector ex parte Venicoff*, [1920] 3 K. B. 72. Such a proceeding would be unthinkable in this country under our due process clauses.



In recent years, however, and particularly since Lord Hewart wrote his book "The New Despotism," 1929, and Mr. C. K. Allen wrote the articles which have been published in "Bureaucracy Triumphant," 1931, the English courts have adopted a more restrictive attitude toward administrative powers. In one of the more recent cases, *Errington v. Minister of Health*, [1935] 1 K. B. 249, the conclusions of the Arlidge case seem to have been somewhat modified, although the precise meaning of the decision is not clear. The English decisions are carefully discussed by Jennings in an article entitled "Courts and Administrative Law: The Experience of English Housing Legislation," 49 Harv. L. Rev. 426 (1936), and the more recent article by S. A. de Smith, "The Right to a Hearing in English Administrative Law," 68 Harv. L. Rev. 569 (1955).<sup>2</sup>

### Public Safety Cases

**Lacey v. Lemmons, Supreme Court of New Mexico, 1916. 22 N. M. 54, 159 Pac. 949.**

PARKER, J. This was an action in replevin brought by the plaintiff and appellee against the defendant and appellant for eleven head of cattle. The complaint alleged that the plaintiff was the owner of the calves, and that in January, 1912, all the said calves were in his possession at his ranch; that defendant, claiming to be an inspector of the cattle sanitary board of the state, took the said calves from his possession and failed and refused to return them; that at the time they were taken the animals were young calves from four to eight or ten months old, and were kept in a corral and pasture adjoining plaintiff's ranch; that four of the calves were only four or five months old, and for that reason were unbranded; that they were worth \$22 per head. It appears that six of the calves were returned to the plaintiff after suit was brought.

The defendant answered, admitting the taking of the calves in controversy, alleging that at the time of the taking the calves were held in an inclosure and were not accompanied by their mothers, and that they were not calves of milch cows actually used to furnish milk for household purposes or carrying on a dairy; that upon information and belief each of the said calves was under age of seven months at the time of taking, and were separated from their mothers, and that demand of plaintiff that he produce the mothers of the said calves within a reasonable time was made; that appellee failed to produce the mothers;

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<sup>2</sup> For a good text treatment of constitutional requirements of notice and hearing, see Mott, "Due Process of Law," 1926, pp. 216-240; also "Due Process Requirements of Notice and Hearing in Administrative Proceedings," 34 Columbia L. Rev. 332 (1934); Dickinson, "Administrative Justice and the Supremacy of Law," 1927, pp. 106-108, footnote; "The Necessity of a Notice and Hearing in Administrative Determinations," 80 U. of Pa. L. Rev. 96 (1931).

and that up to the time of the service of the writ of replevin no attempt had been made by appellee to prove his ownership.

The court sustained a motion interposed by plaintiff for judgment on the pleadings, and rendered judgment against the defendant. The defendant appealed.

The defendant justifies under sections 1628 and 1632, Code 1915, which are as follows:

"Sec. 1628. That hereafter it shall be unlawful for any person, firm or corporation to hold under herd, confine in any pasture, building, corral or other enclosure, or to picket out, hobble, tie together or in any manner interfere with the freedom of calves of neat cattle or colts of horses, asses and burros which are less than seven months old except such young animals be accompanied by their mothers.

"This provision shall not apply to the calves of milch cows when such cows are actually used to furnish milk for household purposes or for carrying on a dairy; but in every such case the person, firm or corporation separating calves from their mothers for either of these purposes shall, upon the demand of any cattle owner, sheriff, inspector or any . . . officer, produce, in a reasonable time, the mother of each one of such calves so that interested parties may ascertain if the cow does or does not claim and suckle such calf."

"Sec. 1632. That all animals held in violation of the preceding four sections shall be considered estrays, and it shall be the duty of any inspector appointed by the cattle sanitary board of the state of New Mexico, who shall receive notice of such violation, to take into his possession as estrays or unclaimed live stock all such animals and hold them for proof of ownership. If the ownership of such estrays be not proved within ten days, they shall be sold by the inspector having them in charge at the highest price obtainable; the funds received from such sale, after the costs of keeping and sale have been deducted, shall be turned over to the cattle board to be kept and disposed of in the same manner as is now provided by law for funds arising from the sale of estrays."

No question is made but that the cattle inspector followed the provisions of this statute. The question presented is whether section 1632, Code 1915, is violative of section 18, art. 2, of the Constitution, which contains the usual guaranty against the deprivation of life, liberty, or property without due process of law. . . .

We have, then, for consideration for the first time, the question as to whether section 1632 authorizes a proceeding violative of the citizens' constitutional right. It is to be noticed that this section contains a definition of what are estrays. It provides, taken in connection with section 1628, that all calves of neat cattle, and other animals named, under seven months of age, held under herd or confined in any of the ways named in the section, shall be considered estrays. Taking into

consideration the nature of the property, we can see no objection to this definition. It is a matter of common knowledge that calves of neat cattle, if separated from their mothers long enough to become weaned, can never afterwards be identified so that the ownership thereof may be established. Cattle in this state almost universally roam at large upon the public ranges, and the only means of identification and the only proof of ownership is by brands. It is also a matter of common knowledge and experience that the only means of identification of the ownership of calves until they are branded is by the observation of the mother and the calf together. If the mother suckles the calf, the identity of the ownership of the calf is established. If the calf is separated from the mother until it becomes weaned, this evidence of ownership is lost and destroyed, rendering the calf subject to the machinations of the cattle thief and with no means of bringing him to justice.

This section, then, is but a legislative declaration that, in regard to this class of property, the mere possession of calves under seven months of age is no evidence whatever of ownership, and that calves held under the circumstances mentioned in the statute and as existing in this case are really estrays because the ownership thereof is, and must be, from a legal and practical standpoint, unknown. As we pointed out in *State v. Brooken* (143 Pac. 479), it is a proper and legitimate exercise of the police power for the Legislature, in the interest of the stock-raising business in the state, to regulate to this extent the use, management, and control of this class of property.

A much more serious consideration arises out of the fact that the statute provides for a seizure and sale of the animals and the payment of the money, less the costs of keeping and sale, to the cattle board, to be kept and disposed of in the same manner as is provided by law for funds arising from the sale of estrays. The disposition of the funds arising from the sale of estrays is provided for in section 162, Code 1915. This section provides that at any time within two years after the sale of the animals the lawful owner may apply to the cattle sanitary board and receive the net amount resulting from such sale, less the sum of \$1 for each estray to be retained by the cattle sanitary board upon the owner proving his ownership to the satisfaction of said cattle sanitary board.

It is to be observed in this connection that this statute provides for no judicial hearing, and provides for no notice of any kind whatever to the owner of the animals seized. It is to be further noticed that the net proceeds, less \$1 for each estray, are to be paid over to the owner of the animals at any time within two years, upon such owner proving his ownership to the satisfaction of the cattle sanitary board. The nature of the proof required of the owner to establish his ownership is not pointed out in the statute.

The question then is whether this statute authorizes the taking of property without due process of law. . . .

It is well established that, in the exercise of the police power, the power of taxation, and the power of eminent domain for governmental purposes, due process of law, in a constitutional sense, does not require judicial process and a proceeding according to the course of the common law. *Cooley's Const. Lim.* (7th Ed.) p. 507; 6 R. C. L. 452, § 448; 1 R. C. L. 1148, § 89; *Chicago, B. & Q. R. Co. v. State*, 47 Neb. 549; *Chicago, B. & Q. R. Co. v. Neb.*, 170 U. S. 57.

If the proceedings in the case at bar are otherwise lawful, there can be objection to them because they are administrative and not judicial.

The trouble with this statute arises out of the fact that no notice is required to be given the alleged owner, either actual or constructive. We assume that either would be sufficient in cases of this kind. It is true that in this case the alleged owner did have knowledge of the seizure of the cattle by the cattle inspector, as is evidenced by the fact that he brought this action of replevin against the inspector, and by the allegations in the pleadings. But this was accidental, and can have no effect in determining the question. It is not what is done under a statute in a given case, but it is what may be done, that determines its constitutionality. *Stuart v. Palmer*, 74 N. Y. 183.<sup>3</sup> And in cases like this the circumstances might, and often would, be such that the alleged owner would have no notice whatever of the seizure and sale of the cattle until long after the same had occurred. The statute also contemplates the passing of the title and relegates the alleged owner to the recovery of the proceeds of sale, less certain deductions, from the cattle sanitary board.

We are compelled to hold that this statute authorizes the taking of property without due process of law. That the proceedings authorized are without judicial process is no objection. But in proceedings before administrative officers or bodies, at some time before the property is finally taken, the owner ordinarily must have notice and opportunity to be heard. 6 R. C. L., p. 446, § 442; *Simon v. Craft*, 182 U. S. 427; *Wileox v. Hemming*, 58 Wis. 144; *Crum v. Bray*, 121 Ga. 709; *Greer v. Downey*, 8 Ariz. 164.

The doctrine stated has been specifically applied to the taking up of animals running at large, in some of the cases cited, and the doctrine

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<sup>3</sup> Not all courts agree with this. In fact it is often held that there is no deprivation of due process if the notice and hearing were in fact afforded by the administrative authorities, even though the statutes do not specifically command such notice to be given. Frequently statutes which are silent as to the matter of notice and hearing will be construed by the courts to include by implication a requirement thereof. *People v. McCoy*, 125 Ill. 289, 17 N. E. 786 (1888); *Armory Realty Co. v. Olsen*, 210 Wis. 281, 246 N. W. 513 (1933). Cf. *Northern Cedar Co. v. French*, 131 Wash. 394, 230 Pac. 837 (1924), in accord with *Stuart v. Palmer*, and discussing many authorities on each side of the question.

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In this connection it may be well to note the distinction between a case of this kind and those cases where some controlling necessity for the public good requires immediate action, and where property of the citizen may be taken without notice and without compensation. The destruction of property to prevent the spread of fires in cities and towns, the destruction of animals afflicted with contagious diseases endangering the public health, are familiar examples of this class of cases. In those cases the rights of the individual must yield to the general welfare of the many.

But in cases like the one at bar no controlling necessity exists to seize and sell cattle taken by a cattle inspector. When cattle situated as these were are seized, the claimant or owner should have an opportunity to assert his right thereto by producing the evidence of their ownership before the cattle inspector, before the same are sold. He should have the right to institute and maintain a suitable action for their recovery, and, as before seen, the statute should require notice to him for that purpose.

It is a matter of regret that we are compelled to declare this act unconstitutional. It is a matter of common knowledge that the most effective way and the method most largely practiced in this state to effectuate the larceny of cattle is to separate calves from their mothers; thus destroying all means of identification and proof of ownership by the true owner. The fact remains, however, that the law must be enforced as it is found to exist, and the remedy lies with the legislative department to enact a suitable statute on this subject.

For the reasons stated, the judgment of the court below will be affirmed; and it is so ordered.<sup>4</sup>

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<sup>4</sup> Bearing in mind that the court upheld the statute, insofar as it ordained that mere possession of young calves, separated from the mother cow, was no evidence at all of ownership, a practical question arises: How could notice be given to the owner, as the court said was constitutionally required, when the owner was unknown? Would it not appear that giving notice to the person in possession of the calves would not satisfy the requirement, because there was no basis (under the statute) for assuming that he was the owner? Yet, the court said that it was immaterial that the alleged owner had in fact received actual notice. Is the court on sound grounds on this last point? How does this approach compare with that of the United States Supreme Court in the *Wong Yang Sung* case, 339 U. S. 33, *supra*, where the court read the requirement of notice into the statute, to save its constitutionality?

See also *Moffat v. Hecke*, 65 Cal. App. 35, 228 Pac. 546 (1924), involving the constitutionality of the Cattle Protection Act which act purported to permit inspectors, under the supervision of the cattle protection board, to take possession of cattle when, on inspection, they concluded that the cattle did not belong to the person in possession thereof. No advance notice and hearing was required. Holding the act invalid, the court said, "One who is in the possession of

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**Southern Ry. Co. v. Virginia, Supreme Court of the United States, 1933. 290 U. S. 190, 78 L. Ed. 260, 54 S. Ct. 148.**

Appeal from a judgment of the Supreme Court of Appeals of Virginia which affirmed, on appeal, an order of the Corporation Commission of the state requiring the railway company to construct a highway bridge over its tracks, within the limits of its right of way, to take the place of a crossing at grade.

MR. JUSTICE McREYNOLDS delivered the opinion of the court.

This appeal questions the validity of chapter 62, Acts General Assembly of Virginia, 1930; Michie's Code 1930, § 3974a. Pertinent portions are in the margin.<sup>5</sup> The claim is that enforcement of the Act as con-

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property under a claim of right cannot be deprived of its possession without process of law. To constitute due process the statute must itself provide for notice of a time and place of hearing, giving the parties an opportunity to present in a deliberate, regular, and orderly manner issues of fact and law."

Cf. *National Automobile Corp. v. Barford*, 289 Pa. 307, 137 Atl. 601 (1927), holding that due process demands notice and hearing before the assets of an automobile club which issues contracts guaranteeing certain services to automobile owners, such as towing, legal aid, storage, repairs, etc., can be seized on the grounds of insolvency, and the business liquidated by the insurance commissioner.

As to the various requirements concerning notice and hearing in connection with insurance companies, their licenses, etc., see Patterson, "The Insurance Commissioner in the United States," pp. 376-408.

Under the banking laws no notice and hearing is required before the comptroller of the currency (in the case of national banks), or the state banking commissioners in the case of state banks, may take possession and close the doors of an insolvent institution. See, for example, 12 USCA 191-219.

<sup>5</sup> Chapter 62, Acts General Assembly of Virginia, 1930, p. 74 (Michie's Code, § 3974a).

" . . . Whenever the elimination of an existing crossing at grade of a state road by a railroad, or a railroad by a state road, and the substitution therefor of an overhead . . . crossing becomes, in the opinion of the State Highway Commissioner, necessary for public safety and convenience . . . the State Highway Commissioner shall notify in writing the railroad company . . . upon which the existing crossing at grade . . . is situated . . . stating particularly the point at which . . . the existing grade crossing is to be eliminated . . . and that the public safety or convenience requires that the crossing be made . . . above . . . tracks of said railroad, or that the existing grade crossing should be eliminated or abolished, and a crossing constructed above . . . the tracks of said railroad . . . and shall submit to said railroad company plans and specifications of the proposed work. . . . It shall thereupon be the duty of the railroad company to provide all equipment and materials and construct the overhead . . . crossing . . . in accordance with the plans and specifications submitted by the State Highway Commissioner . . . ; *provided, however*, that if the railroad company be not satisfied with the plans and specifications submitted by the State Highway Commissioner, such company may within sixty days after the receipt of said plans and specifications, if the railroad company and the State Highway Commissioner be unable in the meantime to agree on plans and specifications, including the grade of the approaches and the point to which the liability of the railroad



strued by the State Supreme Court would deprive appellant of property without due process of law and thus violate the Fourteenth Amendment.

Purporting to proceed under the challenged chapter, the Highway Commissioner, without prior notice, advised appellant that in his opinion public safety and convenience required eliminating of the grade crossing near Antlers; also, he directed construction there of an overhead passage according to accompanying plans and specifications. Replying, the company questioned the Commissioner's conclusion upon the facts, denied the validity of the Act, and refused to undertake the work. Thereupon, by petition, he asked the State Corporation Commission for an order requiring it to proceed. A demurrer to this questioned the constitutionality of the statute. It especially pointed out that the Commissioner undertook to ordain, without prior notice, and that there was no provision for any review except in respect of the proposed plans for the structure. The Commissioner overruled the demurrer and directed the railway to construct the overhead. The Supreme Court construed the statute and approved this action.

As authoritatively interpreted the challenged Act permits the Highway Commissioner—an executive officer—without notice or hearing to command a railway company to abolish any designated grade crossing and construct an overhead when, in his opinion, necessary for public safety and convenience. His opinion is final upon the fundamental question whether public convenience and necessity require the elimination, unless what the Supreme Court denominates “arbitrary” exercise of the granted power can be shown. Upon petition, filed within sixty days, the Corporation Commission may consider the proposed plans and approve or modify them, but nothing more. The statute makes no provision for review by any court. But the Supreme Court has declared that a court of equity may give relief under an original bill where “arbitrary” action can be established.

As construed and applied, we think the statute conflicts with the Fourteenth Amendment.

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shall extend, file a petition with the State Corporation Commission setting out its objections to the plans and specifications and its recommendations of plans and specifications in lieu thereof, and the Commission shall hear the complaint as other complaints are heard and determined by that body, and shall approve the plans submitted by the State Highway Commissioner, or other plans in lieu thereof; and it shall thereupon be the duty of the railroad company to provide all equipment and materials and construct, widen, strengthen, remodel, redesign, relocate or replace, as the case may be, the overhead or underpass crossing, or provide a new or improved structure in lieu thereof, within its right of way limits, and the State Highway Commissioner the portion outside of the railroad right of way, unless otherwise mutually agreed upon, in accordance with the plans and specifications approved by the State Corporation Commission.”

Upon completion of the work, the costs are to be divided between the state and the railroad. etc.

Certainly, to require abolition of an established grade crossing and the outlay of money necessary to construct an overhead would take the railway's property in a very real sense. This seems plain enough both upon reason and authority. *Washington ex rel. Oregon R. & N. Co. v. Fairchild*, 224 U. S. 510, 523, 524; *Great Northern Ry. Co. v. Minnesota*, 238 U. S. 340, 345. See *Chicago, M. & St. P. Ry. Co. v. Board of Com'rs*, 76 Mont. 305, 247 Pac. 162.

If we assume that by proper legislation a state may impose upon railways the duty of eliminating grade crossings, when deemed necessary for public safety and convenience, the question here is whether the challenged statute meets the requirements of due process of law. Undoubtedly, it attempts to give an administrative officer power to make final determination in respect of facts—the character of a crossing and what is necessary for the public safety and convenience—without notice, without hearing, without evidence; and upon this *ex parte* finding, not subject to general review, to ordain that expenditures shall be made for erecting a new structure. The thing so authorized is no mere police regulation.

In *Interstate Commerce Com. v. Louisville & N. R. Co.*, 227 U. S. 88, 91, replying to the claim that a Commission's order made without substantial supporting evidence was conclusive, this court declared:

"A finding without evidence is arbitrary and baseless. And if the government's contention is correct, it would mean that the Commission had a power possessed by no other officer, administrative body, or tribunal under our government. It would mean that where rights depended upon facts, the Commission could disregard all rules of evidence, and capriciously make findings by administrative fiat. Such authority, however beneficently exercised in one case, could be injuriously exerted in another; is inconsistent with rational justice, and comes under the Constitution's condemnation of all arbitrary exercise of power.

"In the comparatively few cases in which such questions have arisen it has been distinctly recognized that administrative orders, *quasi-judicial* in character, are void if a hearing was denied; if that granted was inadequate or manifestly unfair; if the finding was contrary to the 'in-disputable character of the evidence.'"

*Chicago, M. & St. P. Ry. Co. v. Minnesota*, 134 U. S. 418, 457, 458, involved an act of the Minnesota legislature, which permitted the commission finally to fix railway rates without notice. It was challenged because of conflict with the due process clause. This court said:

"It deprives the company of its right to a judicial investigation, by due process of law, under the forms and with the machinery provided by the wisdom of successive ages for the investigation judicially of the truth of a matter in controversy, and substitutes therefor, as an absolute finality, the action of a Railroad Commission which, in view

of the powers conceded to it by the state court, cannot be regarded as clothed with judicial functions or possessing the machinery of a court of justice. . . . No hearing is provided for, no summons or notice to the company before the Commission has found what it is to find and declared what it is to declare, no opportunity provided for the company to introduce witnesses before the Commission, in fact, nothing which has the semblance of due process of law; . . .

"The question of the reasonableness of a rate of charge for transportation by a railroad company, involving as it does the element of reasonableness both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring due process of law for its determination. If the company is deprived of the power of charging reasonable rates for the use of its property, and such deprivation takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property, and thus, in substance and effect, of the property itself, without due process of law and in violation of the Constitution of the United States; . . ."

The claim that the questioned statute was enacted under the police power of the state and, therefore, is not subject to the standards applicable to legislation under other powers, conflicts with the firmly established rule that every state power is limited by the inhibitions of the Fourteenth Amendment. *Chicago, M. & St. P. Ry. Co. v. Tompkins*, 176 U. S. 167; *Eubank v. Richmond*, 226 U. S. 137, 143; *Adams v. Tanner*, 244 U. S. 590, 594; *Adkins v. Children's Hospital*, 261 U. S. 525, 549, 550.

*Lawton v. Steele*, 152 U. S. 133, points out that the right to destroy private property—nuisances, etc.—for protection against imminent danger, has long been recognized. Such action does no violence to the Fourteenth Amendment. The principles which control have no present application. Here, the statute itself contemplates material delay; no impending danger demands immediate action. During sixty days the railway may seek modification of the plans proposed.

Counsel submit that the legislature, without giving notice or opportunity to be heard, by direct order might have required elimination of the crossing. Consequently, they conclude the same end may be accomplished in any manner which it deems advisable, without violating the Federal Constitution. But if we assume that a state legislature may determine what public welfare demands and by direct command require a railway to act accordingly, it by no means follows that an administrative officer may be empowered, without notice or hearing, to act with finality upon his own opinion and ordain the taking of private property. There is an obvious difference between legislative determination and the finding of an administrative official not supported by evidence. In theory, at least, the legislature acts upon adequate knowl-

edge after full consideration and through members who represent the entire public.

Chapter 62 undertakes to empower the Highway Commissioner to take railway property if and when he deems it necessary for public safety and convenience. It makes no provision for a hearing, and grants no opportunity for a review in any court. This, we think, amounts to the delegation of purely arbitrary and unconstitutional power unless the indefinite right of resort to a court of equity referred to by the court below affords adequate protection.

Considering the decisions here, it is clear that no such authority as that claimed for the Commissioner could be entrusted to an administrative office or body under the power to tax, to impose assessments for benefits, to regulate common carriers, to establish drainage districts, or to regulate business. *Turner v. Wade*, 254 U. S. 64, 70; *Browning v. Hooper*, 269 U. S. 396, 405; *Interstate Commerce Com. v. Louisville & N. R. Co.*, 227 U. S. 88; *Embree v. Kansas City Road District*, 240 U. S. 242, 247; *Yick Wo v. Hopkins*, 118 U. S. 356. Appellee makes no claim to the contrary. He affirms, however, that under the police power the legislature could rightly grant the challenged authority. But, as pointed out above, this is subject to the inhibitions of the Fourteenth Amendment, and we think the suggested distinction between it and other powers of the state is unsound.

This court has often recognized the power of a state, acting through an executive officer or body, to order the removal of grade crossings; but in all these cases there was the right to a hearing and review by some court. See *Great Northern Ry. Co. v. Clara City*, 246 U. S. 434; *Erie R. Co. v. Public Utility Com'rs*, 254 U. S. 394; *Lehigh Valley R. Co. v. Board of Com'rs*, 278 U. S. 24.

After affirming appellant's obligation to comply with the Commissioner's order, the court below said: "The railroad is not without remedy. Should the power vested in the Highway Commissioner be arbitrarily exercised, equity's long arm will stay his hand." But, by sanctioning the order directing the railway to proceed, it, in effect, approved action taken without hearing, without evidence, without opportunity to know the basis therefor. This was to rule that such action was not necessarily "arbitrary." There is nothing to indicate what that court would deem arbitrary action or how this could be established in the absence of evidence or hearing. In circumstances like those here disclosed no contestant could have fair opportunity for relief in a court of equity. There would be nothing to show the grounds upon which the Commissioner based his conclusion. He alone would be cognizant of the mental processes which begot his urgent opinion.

The infirmities of the enactment are not relieved by an indefinite right of review in respect of some action spoken of as arbitrary. Before its property can be taken under the edict of an administrative

officer the appellant is entitled to a fair hearing upon the fundamental facts. This has not been accorded. The judgment below must be reversed. The cause will be remanded for further proceedings not inconsistent with this opinion.

Reversed.

The Chief Justice, MR. JUSTICE STONE and MR. JUSTICE CARDOZO dissent upon the ground that there has been a lawful delegation to the State Highway Commissioner of the power to declare the need for the abatement of a nuisance through the elimination of grade crossings dangerous to life and limb; that this power may be exercised without notice or a hearing (*Chicago, B. & Q. R. Co. v. Nebraska*, 170 U. S. 57, 77), provided adequate opportunity is afforded for review in the event that the power is perverted or abused; and that such opportunity has been given by the statutes of Virginia as construed by its highest court.<sup>6</sup>

**North American Cold Storage Co. v. Chicago, Supreme Court of the United States, 1908. 211 U. S. 306, 53 L. Ed. 195, 29 S. Ct. 101.**

The bill was filed against the city of Chicago and the various individual defendants in their official capacities,—commissioner of health of the city of Chicago, secretary of the department of health, chief food inspector of the department of health, and inspectors of that department, and policemen of the city,—for the purpose of obtaining an injunction under the circumstances set forth in the bill. It was therein alleged that the complainant was a cold storage company, having a cold storage plant in the city of Chicago, and that it received, for the purpose of keeping in cold storage, food products and goods as bailee for hire; that, on an average, it received \$20,000 worth of goods per day, and returned a like amount to its customers, daily, and that it had on an average in storage about two million dollars' worth of goods; that it received some 47 barrels of poultry on or about October 2, 1906, from a wholesale dealer, in due course of business, to be kept by it and returned to such dealer on demand; that the poultry was, when received, in good condition and wholesome for human food, and had been so maintained by it in cold storage from that time, and it would remain so, if undisturbed, for three months; that on the 2d of October, 1906, the individual defendants appeared at complainant's place of business and demanded of it that it forthwith deliver the

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<sup>6</sup> Does this case really turn on lack of notice, or on the delegation of broad legislative powers without a sufficiently definite standard?

Would the United States Supreme Court follow this case today?

As to the power of city councils to impose somewhat similar burdens upon railroads without notice and hearing, see *Atlantic Coast Line R. Co. v. City of Goldsboro*, 232 U. S. 548, 58 L. Ed. 721, 34 S. Ct. 364 (1914); *Chicago, B. & Q. R. Co. v. Nebraska ex rel. Omaha*, 170 U. S. 57, 42 L. Ed. 948, 18 S. Ct. 513 (1898); "Necessity of Hearing to Determine Need for Elimination of Grade Crossing," 43 *Yale L. J.* 840 (1934).

47 barrels of poultry for the purpose of being by them destroyed, the defendants alleging that the poultry had become putrid, decayed, poisonous, or infected in such a manner as to render it unsafe or unwholesome for human food. The demand was made under § 1161 of the Revised Municipal Code of the City of Chicago for 1905, which reads as follows:

"Every person being the owner, lessee, or occupant of any room, stall, freight house, cold storage house, or other place, other than a private dwelling, where any meat, fish, poultry, game, vegetables, fruit, or other perishable articles adapted or designed to be used for human food shall be stored or kept, whether temporarily or otherwise, and every person having charge of, or being interested or engaged, whether as principal or agent, in the care of or in respect to the custody or sale of any such article of food supply, shall put, preserve, and keep such article of food supply in a clean and wholesome condition, and shall not allow the same, nor any part thereof, to become putrid, decayed, poisoned, infected, or in any other manner rendered or made unsafe or unwholesome for human food; and it shall be the duty of the meat and food inspectors and other duly authorized employees of the health department of the city to enter any and all such premises above specified at any time of any day, and to forthwith seize, condemn, and destroy any such putrid, decayed, poisoned, and infected food, which any such inspector may find in and upon said premises."

The complainant refused to deliver up the poultry, on the ground that the section above quoted of the Municipal Code of Chicago, in so far as it allows the city or its agents to seize, condemn, or destroy food or other food products, was in conflict with that portion of the 14th Amendment which provides that no state shall deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

After the refusal of the complainant to deliver the poultry, the defendants stated that they would not permit the complainant's business to be further conducted until it complied with the demand of the defendants and delivered up the poultry, nor would they permit any more goods to be received into the warehouse or taken from the same, and that they would arrest and imprison any person who attempted to do so, until complainant complied with their demand and delivered up the poultry. Since that time the complainant's business has been stopped and the complainant has been unable to deliver any goods from its plant or receive the same.

The bill averred that the attempt to seize, condemn, and destroy the poultry, without a judicial determination of the fact that the same was putrid, decayed, poisonous, or infected was illegal; and it asked that the defendants, and each of them, might be enjoined from taking

or removing the poultry from the warehouse, or from destroying the same, and that they also be enjoined from preventing complainant delivering its goods and receiving from its customers, in due course of business, the goods committed to its care for storage. . . .

[Defendants demurred to the bill and the demurrer was sustained by the trial court.]

MR. JUSTICE PECKHAM, after making the foregoing statement, delivered the opinion of the court.

. . . The action of the defendants, which is admitted by the demurrer, in refusing to permit the complainant to carry on its ordinary business until it delivered the poultry, would seem to have been arbitrary and wholly indefensible. Counsel for the complainant, however, for the purpose of obtaining a decision in regard to the constitutional question as to the right to seize and destroy property without a prior hearing, states that he will lay no stress here upon that portion of the bill which alleges the unlawful and forcible taking possession of complainant's business by the defendants. He states in his brief as follows:

"There is but one question in this case, and that question is, Is section 1161 of the Revised Municipal Code of Chicago in conflict with the due process of law provision of the Fourteenth Amendment, in this, that it does not provide for notice and an opportunity to be heard before the destruction of the food products therein referred to?" . . .

The general power of the state to legislate upon the subject embraced in the above ordinance of the city of Chicago, counsel does not deny. See *California Reduction Co. v. Sanitary Reduction Works*, 199 U. S. 306. Nor does he deny the right to seize and destroy unwholesome or putrid food, provided that notice and opportunity to be heard be given the owner or custodian of the property before it is destroyed. We are of opinion, however, that provision for a hearing before seizure and condemnation and destruction of food which is unwholesome and unfit for use is not necessary. The right to so seize is based upon the right and duty of the state to protect and guard, as far as possible, the lives and health of its inhabitants, and that it is proper to provide that food which is unfit for human consumption should be summarily seized and destroyed to prevent the danger which would arise from eating it. The right to so seize and destroy is, of course, based upon the fact that the food is not fit to be eaten. Food that is in such a condition, if kept for sale or in danger of being sold, is in itself a nuisance, and a nuisance of the most dangerous kind, involving, as it does, the health, if not the lives, of persons who may eat it. A determination on the part of the seizing officers that food is in an unfit condition to be eaten is not a decision which concludes the owner. The *ex parte* finding of the health officers as to the fact

is not in any way binding upon those who own or claim the right to sell the food. If a party cannot get his hearing in advance of the seizure and destruction, he has the right to have it afterward, which right may be claimed upon the trial in an action brought for the destruction of his property; and in that action those who destroyed it can only successfully defend if the jury shall find the fact of unwholesomeness, as claimed by them. The often-cited case of *Lawton v. Steele*, 152 U. S. 133, substantially holds this. . . .

*Miller v. Horton*, 152 Mass. 540, is in principle like the case before us. It was an action brought for killing the plaintiff's horse. The defendants admitted the killing, but justified the act under an order of the board of health, which declared that the horse had the glanders, and directed it to be killed. The court held that the decision of the board of health was not conclusive as to whether or not the horse was diseased, and said that: "Of course there cannot be a trial by jury before killing an animal supposed to have a contagious disease, and we assume that the legislature may authorize its destruction in such emergencies without a hearing beforehand. But it does not follow that it can throw the loss on the owner without a hearing. If he cannot be heard beforehand he may be heard afterward. The statute may provide for paying him in case it should appear that his property was not what the legislature had declared to be a nuisance, and may give him his hearing in that way. If it does not do so, the statute may leave those who act under it to proceed at their peril, and the owner gets his hearing in an action against them." . . .

Complainant, however, contends that there was no emergency requiring speedy action for the destruction of the poultry in order to protect the public health from danger resulting from consumption of such poultry. It is said that the food was in cold storage, and that it would continue in the same condition it then was for three months, if properly stored, and that therefore the defendants had ample time in which to give notice to complainant or the owner and have a hearing of the question as to the condition of the poultry; and, as the ordinance provided for no hearing, it was void. But we think this is not required. The power of the legislature to enact laws in relation to the public health being conceded, as it must be, it is to a great extent within legislative discretion as to whether any hearing need be given before the destruction of unwholesome food which is unfit for human consumption. If a hearing were to be always necessary, even under the circumstances of this case, the question at once arises as to what is to be done with the food in the meantime. Is it to remain with the cold storage company, and, if so, under what security that it will not be removed? To be sure that it will not be removed during the time necessary for the hearing, which might frequently be indefinitely prolonged, some guard would probably have to be placed over the subject



matter of investigation, which would involve expense, and might not even then prove effectual. What is the emergency which would render a hearing unnecessary? We think when the question is one regarding the destruction of food which is not fit for human use the emergency must be one which would fairly appeal to the reasonable discretion of the legislature as to the necessity for a prior hearing, and in that case its decision would not be a subject for review by the courts. As the owner of the food or its custodian is amply protected against the party seizing the food, who must, in a subsequent action against him, show as a fact that it was within the statute, we think that due process of law is not denied the owner or custodian by the destruction of the food alleged to be unwholesome and unfit for human food without a preliminary hearing. The cases cited by the complainant do not run counter to those we have above referred to.

Even if it be a fact that some value may remain for certain purposes in food that is unfit for human consumption, the right to destroy it is not, on that account, taken away. The small value that might remain in said food is a mere incident, and furnishes no defense to its destruction when it is plainly kept to be sold at some time as food. *California Reduction Co. v. Sanitary Reduction Works*, 199 U. S. 306-322; *Gardner v. Michigan*, 199 U. S. 325.

The decree of the court below is modified by striking out the ground for dismissal of the bill as being for want of jurisdiction, and, as modified, is affirmed.

MR. JUSTICE BREWER dissents.<sup>7</sup>

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<sup>7</sup> Comparing *North American Cold Storage Co. v. Chicago with Southern Ry. Co. v. Virginia*, supra, would you say that the immediacy of the public danger is an important factor in determining the necessity of notice and hearing?

Do the courts also consider the substantiality of the property interests involved? Cf. *Lawton v. Steele*, 152 U. S. 133, 38 L. Ed. 385, 14 S. Ct. 499 (1894) and *Colon v. Lisk*, 153 N. Y. 188, 47 N. E. 302 (1897). In the former case, the court upheld the summary destruction, without notice, of fish nets maintained in alleged violation of a statute, and declared that it would be "belittling the dignity of the judiciary" to require the destruction of "property . . . of trifling value" to be "preceded by a solemn condemnation in a court of justice." In the latter case, the fisherman's boats rather than his nets were the subject of the statute, and it was held that notice and a formal hearing were required before seizure could be made, the court pointing out that the property involved might reach in value many thousands of dollars.

See Powell, "Administrative Exercise of the Police Power," 24 *Harv. L. Rev.* 268, 333, 441 (1911), particularly at 334-338, and for a thorough discussion of all angles of the question of notice and hearing before administrative agencies one should read Davis, "The Requirement of Opportunity to Be Heard in the Administrative Process," 51 *Yale L. J.* 1093 (1942); also Hankins "The Necessity of Administrative Notice and Hearing," 25 *Iowa L. Rev.* 457 (1940).

## Tax Proceedings

**Londoner v. City and County of Denver, Supreme Court of the United States, 1908. 210 U. S. 373, 52 L. Ed. 1103, 28 S. Ct. 708.**

MR. JUSTICE MOODY delivered the opinion of the court.

The plaintiffs in error began this proceeding in a state court of Colorado to relieve lands owned by them from an assessment of a tax for the cost of paving a street upon which the lands abutted. The relief sought was granted by the trial court, but its action was reversed by the Supreme Court of the state, which ordered judgment for the defendants. 33 Colo. 104, 80 Pac. 117. The case is here on writ of error. The supreme court held that the tax was assessed in conformity with the Constitution and laws of the state, and its decision of that question is conclusive.

The assignments of error relied upon are as follows:

"First. The Supreme Court of Colorado erred in holding and deciding that the portion of proviso 'eighth' of § 3 of article 7 of 'An Act to Revise and Amend the Charter of the City of Denver, Colorado, Signed and Approved by the Governor of Colorado, April 3, 1893' (commonly called the Denver city charter of 1893), which provided, 'And the finding of the city council by ordinance that any improvements provided for in this article were duly ordered after notice duly given, or that a petition or remonstrance was or was not filed as above provided, or was or was not subscribed by the required number of owners aforesaid, shall be conclusive in every court or other tribunal,' as construed by the Supreme Court of Colorado, was valid and conclusive as against these appellees. The validity of so much of said section as is above quoted was drawn in question and denied by appellees in said cause, on the ground of its being repugnant to the due process of law clause of the 14th Amendment of the Constitution of the United States, and in contravention thereof. . . ."

"Fifth. The Supreme Court of Colorado more particularly erred in holding and deciding that the city authorities, in following the procedure in this Eighth avenue paving district, No. 1, of the city of Denver, Colorado, in the manner in which the record, evidence, and decree of the trial court affirmatively shows that they did, constituted due process of law as to these several appellees (now plaintiffs in error) as guaranteed by the 14th Amendment of the Constitution of the United States."

"Ninth. The Supreme Court of Colorado erred in upholding §§ 29, 30, and 31, and each thereof, of article 7 of 'An Act to Revise and Amend the Charter of the City of Denver, Colorado, Signed and Approved by the Governor of Colorado, April 3d, 1893' (commonly called the Denver city charter of 1893), and not holding it special legislation and a denial of the equal protection of the laws and taking of liberty

and property of these several plaintiffs in error without due process of law, in violation of both the State and Federal Constitution and the 14th Amendment thereof. . . .”

These assignments will be passed upon in the order in which they seem to arise in the consideration of the whole case.

The tax complained of was assessed under the provisions of the charter of the city of Denver, which confers upon the city the power to make local improvements and to assess the cost upon property specially benefited. It does not seem necessary to set forth fully the elaborate provisions of the charter regulating the exercise of this power, except where they call for special examination. The board of public works, upon the petition of a majority of the owners of the frontage to be assessed, may order the paving of a street. The board must, however, first adopt specifications, mark out a district of assessment, cause a map to be made and an estimate of the cost, with the approximate amount to be assessed upon each lot of land. Before action, notice by publication and an opportunity to be heard to any person interested must be given by the board.

The board may then order the improvement, but must recommend to the city council a form of ordinance authorizing it, and establishing an assessment district, which is not amendable by the council. The council may then, in its discretion, pass or refuse to pass the ordinance. If the ordinance is passed, the contract for the work is made by the mayor. The charter provides that “the finding of the city council, by ordinance, that any improvements provided for in this article were duly ordered after notice duly given, or that a petition or remonstrance was or was not filed as above provided, or was or was not subscribed by the required number of owners aforesaid, shall be conclusive in every court or other tribunal.” The charter then provides for the assessment of the cost in the following sections:

“Sec. 29. Upon completion of any local improvement, or, in the case of sewers, upon completion from time to time of any part or parts thereof, affording complete drainage for any part or parts of the district, and acceptance thereof by the board of public works, or whenever the total cost of any such improvement, or of any such part or parts of any sewer, can be definitely ascertained, the board of public works shall prepare a statement therein, showing the whole cost of the improvement, or such parts thereof, including 6 per cent additional for costs of collection and other incidentals, and interest to the next succeeding date upon which general taxes, or the first installment thereof are, by the laws of this state, made payable; and apportioning the same upon each lot or tract of land to be assessed for the same, as hereinabove provided; and shall cause the same to be certified by the president and filed in the office of the city clerk.

"Sec. 30. The city clerk shall thereupon, by advertisement for ten days in some newspaper of general circulation, published in the city of Denver, notify the owners of the real estate to be assessed that said improvements have been, or are about to be, completed and accepted, therein specifying the whole cost of the improvements and the share so apportioned to each lot or tract of land, and that any complaints or objections that may be made in writing, by the owners, to the city council and filed with the city clerk within thirty days from the first publication of such notice, will be heard and determined by the city council before the passage of any ordinance assessing the cost of said improvements.

"Sec. 31. After the period specified in said notice the city council, sitting as a board of equalization, shall hear and determine all such complaints and objections, and may recommend to the board of public works any modification of the apportionments made by said board; the board may thereupon make such modifications and changes as to them may seem equitable and just, or may confirm the first apportionment, and shall notify the city council of their final decision; and the city council shall thereupon by ordinance assess the cost of said improvements against all the real estate in said district respectively in the proportions above mentioned."

It appears from the charter that, in the execution of the power to make local improvements and assess the cost upon the property specially benefited, the main steps to be taken by the city authorities are plainly marked and separated: 1. The board of public works must transmit to the city council a resolution ordering the work to be done and the form of an ordinance authorizing it and creating an assessment district. This it can do only upon certain conditions, one of which is that there shall first be filed a petition asking the improvement, signed by the owners of the majority of the frontage to be assessed. 2. The passage of that ordinance by the city council, which is given authority to determine conclusively whether the action of the board was duly taken. 3. The assessment of the cost upon the landowners after due notice and opportunity for hearing.

In the case before us the board took the first step by transmitting to the council the resolution to do the work and the form of an ordinance authorizing it. It is contended, however, that there was wanting an essential condition of the jurisdiction of the board; namely, such a petition from the owners as the law requires. The trial court found this contention to be true. But, as has been seen, the charter gave the city council the authority to determine conclusively that the improvements were duly ordered by the board after due notice and a proper petition. In the exercise of this authority the city council, in the ordinance directing the improvement to be made, adjudged, in effect, that a proper petition had been filed. That ordinance, after

reciting a compliance by the board with the charter in other respects, and that "certain petitions for said improvements were first presented to the said board, subscribed by the owners of a majority of the frontage to be assessed for said improvements, as by the city charter required," enacted "That, upon consideration of the premises, the city council doth find that, in their action and proceedings in relation to said Eighth avenue paving district Number 1, the said board of public works has fully complied with the requirements of the city charter relating thereto." The state Supreme Court held that the determination of the city council was conclusive that a proper petition was filed, and that decision must be accepted by us as the law of the state. The only question for this court is whether the charter provision authorizing such a finding, without notice to the landowners, denies to them due process of law. We think it does not. The proceedings, from the beginning up to and including the passage of the ordinance authorizing the work, did not include any assessment or necessitate any assessment, although they laid the foundation for an assessment, which might or might not subsequently be made. Clearly all this might validly be done without hearing to the landowners, provided a hearing upon the assessment itself is afforded. *Voigt v. Detroit*, 184 U. S. 115; *Goodrich v. Detroit*, 184 U. S. 432. The legislature might have authorized the making of improvements by the city council without any petition. If it chose to exact a petition as a security for wise and just action, it could, so far as the Federal Constitution is concerned, accompany that condition with a provision that the council, with or without notice, should determine finally whether it had been performed. This disposes of the first assignment of error, which is overruled. . . .

The ninth assignment questions the constitutionality of that part of the law which authorizes the assessment of benefits. It seems desirable, for the proper disposition of this and the next assignment, to state the construction which the Supreme Court gave to the charter. This may be found in the judgment under review and two cases decided with it. *Denver v. Kennedy*, 33 Colo. 80; *Denver v. Dumars*, 33 Colo. 94. From these cases it appears that the lien upon the adjoining land arises out of the assessment; after the cost of the work and the provisional apportionment is certified to the city council, the landowners affected are afforded an opportunity to be heard upon the validity and amount of the assessment by the council, sitting as a board of equalization; if any further notice than the notice to file complaints and objections is required, the city authorities have the implied power to give it; the hearing must be before the assessment is made; this hearing, provided for by § 31, is one where the board of equalization "shall hear the parties complaining and such testimony as they may offer in support of their complaints and objections as would be competent and relevant" (33 Colo. 97); and that the full hearing before the board

of equalization excludes the courts from entertaining any objections which are cognizable by this board. The statute itself, therefore, is clear of all constitutional faults. It remains to see how it was administered in the case at bar.

The fifth assignment, though general, vague, and obscure, fairly raises, we think, the question whether the assessment was made without notice and opportunity for hearing to those affected by it, thereby denying to them due process of law. The trial court found as a fact that no opportunity for hearing was afforded, and the Supreme Court did not disturb this finding. The record discloses what was actually done, and there seems to be no dispute about it. After the improvement was completed, the board of public works, in compliance with § 29 of the charter, certified to the city clerk a statement of the cost, and an apportionment of it to the lots of land to be assessed. Thereupon the city clerk, in compliance with § 30, published a notice, stating, *inter alia*, that the written complaints or objections of the owners, if filed within thirty days, would be "heard and determined by the city council before the passage of any ordinance assessing the cost." Those interested, therefore, were informed that if they reduced their complaints and objections to writing, and filed them within thirty days, those complaints and objections would be heard, and would be heard before any assessment was made. The notice given in this case, although following the words of the statute, did not fix the time for hearing and apparently there were no stated sittings of the council acting as a board of equalization. But the notice purported only to fix the time for filing the complaints and objections, and to inform those who should file them that they would be heard before action. The statute expressly required no other notice, but it was sustained in the court below on the authority of *Paulsen v. Portland*, 149 U. S. 30, because there was an implied power in the city council to give notice of the time for hearing. We think that the court rightly conceived the meaning of that case, and that the statute could be sustained only upon the theory drawn from it. Resting upon the assurance that they would be heard, the plaintiffs in error filed within the thirty days the following paper: . . . (Then follows a verbatim statement of the written protest filed by the plaintiffs, the protest being directed against the entire proposed assessment on the ground that the proceedings leading up to it were illegal, unconstitutional and void, and that the provisions of the charter authorizing the proposed assessment were unconstitutional and void.)

This certainly was a complaint against and an objection to the proposed assessment. Instead of affording the plaintiffs in error an opportunity to be heard upon its allegations, the city council, without notice to them, met as a board of equalization, not in a stated, but in a

specially called, session, and, without any hearing, adopted the following resolution:

"Whereas, complaints have been filed by the various persons and firms as the owners of real estate included within the Eighth avenue paving district No. 1, of the city of Denver, against the proposed assessments on said property for the cost of said paving, the names and description of the real estate respectively owned by such persons being more particularly described in the various complaints filed with the city clerk; and

"Whereas, no complaint or objection has been filed or made against the apportionment of said assessment made by the board of public works of the city of Denver, but the complaints and objections filed deny wholly the right of the city to assess any district or portion of the assessable property of the city of Denver; therefore, be it

"Resolved, by the city council of the city of Denver, sitting as a board of equalization, that the apportionments of said assessment made by said board of public works be, and the same are hereby, confirmed and approved."

Subsequently, without further notice or hearing, the city council enacted the ordinance of assessment whose validity is to be determined in this case. The facts out of which the question on this assignment arises may be compressed into small compass. The first step in the assessment proceedings was by the certificate of the board of public works of the cost of the improvement and a preliminary apportionment of it. The last step was the enactment of the assessment ordinance. From beginning to end of the proceedings the landowners, although allowed to formulate and file complaints and objections, were not afforded an opportunity to be heard upon them. Upon these facts, was there a denial by the state of the due process of law guaranteed by the 14th Amendment to the Constitution of the United States?

In the assessment, apportionment, and collection of taxes upon property within their jurisdiction, the Constitution of the United States imposes few restrictions upon the states. In the enforcement of such restrictions as the Constitution does impose, this court has regarded substance, and not form. But where the legislature of a state, instead of fixing the tax itself, commits to some subordinate body the duty of determining whether, in what amount, and upon whom it shall be levied, and of making its assessment and apportionment, due process of law requires that, at some stage of the proceedings, before the tax becomes irrevocably fixed, the taxpayer shall have an opportunity to be heard, of which he must have notice, either personal, by publication, or by a law fixing the time and place of the hearing. *Hagar v. Reclamation Dist. No. 108*, 111 U. S. 701; *Kentucky R. Tax Cases*, 115 U. S. 321;

Winona & St. P. Land Co. v. Minnesota, 159 U. S. 526; Lent v. Tillson, 140 U. S. 316; Glidden v. Harrington, 189 U. S. 255; Hibben v. Smith, 191 U. S. 310; Security Trust & S. V. Co. v. Lexington, 203 U. S. 323; Central R. Co. v. Wright, 207 U. S. 127. It must be remembered that the law of Colorado denies the landowner the right to object in the courts to the assessment, upon the ground that the objections are cognizable only by the board of equalization.

If it is enough that, under such circumstances, an opportunity is given to submit in writing all objections to and complaints of the tax to the board, then there was a hearing afforded in the case at bar. But we think that something more than that, even in proceedings for taxation, is required by due process of law. Many requirements essential in strictly judicial proceedings may be dispensed with in proceedings of this nature. But even here a hearing, in its very essence, demands that he who is entitled to it shall have the right to support his allegations by argument, however brief; and, if need be, by proof, however informal. *Pittsburgh, C., C. & St. L. R. Co. v. Backus*, 154 U. S. 421; *Fallbrook Irrig. Dist. v. Bradley*, 164 U. S. 112.

It is apparent that such a hearing was denied to the plaintiffs in error. The denial was by the city council, which, while acting as a board of equalization, represents the state. *Raymond v. Chicago Union Traction Co.*, 207 U. S. 20. The assessment was therefore void, and the plaintiffs in error were entitled to a decree discharging their lands from a lien on account of it. It is not now necessary to consider the tenth assignment of error.

Judgment reversed.

The Chief Justice and MR. JUSTICE HOLMES dissent.<sup>8</sup>

**Bi-Metallic Investment Co. v. State Board of Equalization of Colorado, Supreme Court of the United States, 1915. 239 U. S. 441, 60 L. Ed. 372, 36 S. Ct. 141.**

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a suit to enjoin the State Board of Equalization and the Colorado Tax Commission from putting in force and the defendant Pitcher, as assessor of Denver, from obeying, an order of the boards, in-

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<sup>8</sup> No notice or hearing is necessary as a matter of constitutional right in passing upon the necessity for the improvements. *Chicago, M., St. P. & P. R. Co. v. Risty*, 276 U. S. 567, 72 L. Ed. 703, 48 S. Ct. 396 (1928).

As to the right of property owners to be heard on the question of benefits when the assessment is spread on the basis of the "front foot" rule, or some other mathematical formula, see *Swayne v. Hattiesburg*, 147 Miss. 244, 111 So. 818 (1927), *aff'd* 276 U. S. 599, 72 L. Ed. 724, 48 S. Ct. 320 (1928), on authority of *Embree v. Kansas City—Liberty Boulevard Road Dist.*, 240 U. S. 242, 60 L. Ed. 624, 36 S. Ct. 317 (1915); see also "Assessments for Improvements by the Front-Foot Rule," 28 L. R. A. (N. S.) 1124 (1910); 56 A. L. R. 941 (1928).



creasing the valuation of all taxable property in Denver 40 per cent. The order was sustained and the suit directed to be dismissed by the Supreme Court of the state. 56 Colo. 512. See 56 Colo. 343. The plaintiff is the owner of real estate in Denver, and brings the case here on the ground that it was given no opportunity to be heard, and that therefore its property will be taken without due process of law, contrary to the 14th Amendment of the Constitution of the United States. That is the only question with which we have to deal. There are suggestions on the one side that the construction of the State Constitution and laws was an unwarranted surprise, and on the other, that the decision might have been placed, although it was not, on the ground that there was an adequate remedy at law. With these suggestions we have nothing to do. They are matters purely of state law. The answer to the former needs no amplification; that to the latter is that the allowance of equitable relief is a question of state policy, and that as the Supreme Court of the state treated the merits as legitimately before it, we are not to speculate whether it might or might not have thrown out the suit upon the preliminary ground.

For the purposes of decision we assume that the constitutional question is presented in the baldest way,—that neither the plaintiff nor the assessor of Denver, who presents a brief on the plaintiff's side, nor any representative of the city and county, was given an opportunity to be heard, other than such as they may have had by reason of the fact that the time of meeting of the boards is fixed by law. On this assumption it is obvious that injustice may be suffered if some property in the county already has been valued at its full worth. But if certain property has been valued at a rate different from that generally prevailing in the county, the owner has had his opportunity to protest and appeal as usual in our system of taxation (*Hagar v. Reclamation Dist.*, 111 U. S. 701), so that it must be assumed that the property owners in the county all stand alike. The question, then, is whether all individuals have a constitutional right to be heard before a matter can be decided in which all are equally concerned,—here, for instance, before a superior board decides that the local taxing officers have adopted a system of undervaluation throughout a county, as notoriously often has been the case. The answer of this court in the *State R. Tax Cases*, 92 U. S. 575, at least, as to any further notice, was that it was hard to believe that the proposition was seriously made.

Where a rule of conduct applies to more than a few people, it is impracticable that everyone should have a direct voice in its adoption. The Constitution does not require all public acts to be done in town meeting or an assembly of the whole. General statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard. Their rights are protected in the only way that they can be in a com-

plex society, by their power, immediate or remote, over those who make the rule. If the result in this case had been reached, as it might have been by the state's doubling the rate of taxation, no one would suggest that the 14th Amendment was violated unless every person affected had been allowed an opportunity to raise his voice against it before the body intrusted by the state Constitution with the power. In considering this case in this court we must assume that the proper state machinery has been used, and the question is whether, if the state Constitution had declared that Denver had been undervalued as compared with the rest of the state, and had decreed that for the current year the valuation should be 40 per cent higher, the objection now urged could prevail. It appears to us that to put the question is to answer it. There must be a limit to individual argument in such matters if government is to go on. In *Londoner v. Denver*, 210 U. S. 373, a local board had to determine "whether, in what amount, and upon whom" a tax for paving a street should be levied for special benefits. A relatively small number of persons was concerned, who were exceptionally affected, in each case upon individual grounds, and it was held that they had a right to a hearing. But that decision is far from reaching a general determination dealing only with the principle upon which all the assessments in a county had been laid.

Judgment affirmed.<sup>9</sup>

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<sup>9</sup> Is *Bi-Metallic Inv. Co. v. State Board* consistent with *Londoner v. Denver*, *supra*?

How about the suggestion in the court's opinion in the *Bi-Metallic* case that if the state had doubled the rate of taxation, the result would have been the same? Is this correct? Or was the gist of plaintiffs' complaint that the increase, instead of applying uniformly on a state-wide basis, was imposed solely, and in a discriminatory fashion, on taxpayers resident in the city of Denver?

Do you agree with the statement in the court's opinion in the *Bi-Metallic* case that where a rule of conduct applies to more than a few people, it is impracticable that everyone should have a direct voice in its adoption? Does this mean that in the case of proceedings to reorganize a very large corporation (such as *American Tel. & Tel. or General Motors*) through the processes of a federal court, it would not be necessary to give notice to stockholders? Suppose the Railroad Adjustment Board invalidated the seniority provisions of a union contract, affecting the seniority rights of thousands of union members. Would the principle of this case make it unnecessary to give them notice and an opportunity to be heard? See *Hunter v. Atchison, T. & S. F. Ry. Co.* (7th Cir., 1948), 171 F. (2d) 594.

Cf. *Hammond, County Treasurer v. Winder*, 100 Ohio St. 433, 126 N. E. 409 (1919), applying the principle of the *Bi-Metallic* case to a horizontal increase of assessments on certain classes of property within a taxing district (in this case coal mining properties); *Draffen v. City of Paducah*, 215 Ky. 139, 284 S. W. 1027 (1926), holding that due process requires notice and opportunity to be heard prior to a uniform increase of all property valuations in the taxing district; *Northwestern Bell Tel. Co. v. State Board of Equalization*, 119 Neb. 138, 227 N. W. 452 (1929), requiring notice and hearing before

### Rule Making

**The Assigned Car Cases, Supreme Court of the United States, 1926.**  
274 U. S. 564, 71 L. Ed. 1204, 47 S. Ct. 727.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

These five suits were brought in the Federal Court for Eastern Pennsylvania under the Urgent Deficiencies Act, October 22, 1913, c. 32, 38 Stat. 208, 219, to enjoin and annul an order of the Interstate Commerce Commission. The order, which was to become effective March 1, 1925, prescribes for all railroads subject to its jurisdiction a so-called "Assigned Car Rule" governing the distribution of cars among bituminous coal mines in times of car shortage. Assigned Cars for Bituminous Coal Mines, 80 I. C. C. 520; 93 I. C. C. 701. Some of the plaintiffs are operators of coal mines, some distributors of coal, some large private consumers of coal, and some are railroads. All had been parties to the proceeding before the Commission in which the order was entered. The defendants in each case are the United States, the Interstate Commerce Commission, and various intervening mine operators. All the defendants answered. The cases were heard together on the evidence before three judges. A final decree granting the relief prayed for was entered in each case on December 15, 1925. *Berwind-White Coal-Mining Co. v. United States*, 9 F. (2d) 429. The cases are here on appeal under § 238 of the Judicial Code as amended. They were argued together.

The term "assigned cars" is used in contradistinction to system cars. By assigned cars are meant those placed for use at a specified mine for a particular shipper. By system cars are meant those, from time to time on the line, which are being kept available for use at any mine for any shipper. Assigned cars are of two classes. One class of assigned cars consists of private cars. These are cars owned (or leased) by some shipper (or subject to the control of a particular person not

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ordering a 20 per cent increase of the valuations of all telephone company properties within the state. In this last mentioned case a statute was so interpreted as to require the hearing, but the court indicated that absence of hearing would result in violation of the due process clause.

What is the nature of the function performed by the boards of equalization? *City of New York v. Davenport*, 92 N. Y. 604 (1883).

In many tax proceedings the administrative officers act in a purely ministerial capacity for the reason that the process involved is a purely mechanical or mathematical one. Under such circumstances no notice and hearing need be given for it would be of no service to the taxpayer. *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232, 33 L. Ed. 892, 10 S. Ct. 533 (1890).

Due process of law is satisfied if the procedure is such that the taxpayer may present all of the merits of his case in a court either in connection with injunction proceedings or in connection with enforcement. *Security Trust & Safety Vault Co. v. City of Lexington*, 203 U. S. 323, 51 L. Ed. 204, 27 S. Ct. 87 (1906).

a rail-carrier) who delivers them to the railroad for placement at designated mines for loading and transportation as desired by the owner of the cars. Assigned cars of the other class are called railroad fuel cars. These consist wholly of cars owned (or leased) by some carrier, which, instead of being left, like system cars, for use indiscriminately in carrying coal from any mine for any consignor to any consignee, are assigned to a particular mine to carry coal to be used as fuel by a particular carrier.

Four of the suits were brought by private car owners. They illustrate different conditions under which, or different purposes for which, private cars are so used. The plaintiffs in No. 709 are coal merchants who operate mines. The plaintiffs in No. 710 are integrated concerns which operate mines solely in order to supply coal to their manufacturing plants. The plaintiffs in No. 711 are by-product coke concerns which do not operate any mine. The plaintiff in No. 712 is a public utility which does not operate any mine. In each of these four cases, the cars owned were acquired by the shipper, and are used, solely in order to assure transportation of an indispensable supply of coal. The number of coal cars used on the railroads of the United States is estimated as between 900,000 and 950,000. Of these about 29,000 are private cars.

The fifth suit, No. 606, is brought by owners of railroad fuel cars. The plaintiffs in it are 35 railroads, including many of the leading bituminous coal carriers of the United States and representing each of the several classes of railroad fuel car owners. Railroad fuel cars are divided, according to ownership, into foreign fuel cars, that is, those which belong to, and are used for the fuel supply of, a carrier other than the one on whose lines the mine is located; and home line or system fuel cars, that is, those which are owned by, and are used to supply fuel to, the carrier on whose lines the mine is located. Railroad fuel cars are further classified according to the ownership, use and character of the mine to which they are assigned. That is, whether the cars are used wholly in connection with a mine owned by the carrier which owns the cars; whether they are used in connection with a mine not owned by such carrier but whose whole output is contracted for by it; or whether the mine at which the cars are to be placed is a "commercial" one, that is, a mine which supplies coal also to the general public. About 28 percent of all bituminous coal mined is consumed by railroads. The number of the railroads to which the prescribed rule applies is 3073. Of these, all except the 35 plaintiffs in No. 606 have acquiesced in the order.

The subject of discrimination in the distribution of coal cars in times of car shortage has occupied much of the time of the Commission ever since its establishment. Some general investigations of the matter were undertaken by it pursuant to resolutions of Congress. Many specific

inquiries were made in passing upon complaints of individual shippers who charged unjust discrimination by individual carriers. In two of these cases, *Railroad Commission v. Hocking Valley Ry. Co.*, 12 I. C. C. 398; *Traer v. Chicago & Alton R. Co.*, 13 I. C. C. 451, a rule or practice was prescribed for individual carriers, in 1907 and 1908, which was approved by this court upon review in *Interstate Commerce Commission v. Illinois Central R. Co.*, 215 U. S. 452. That practice, which became known as the Hocking Valley-Traer rule, was later adopted, either voluntarily or pursuant to orders of the Commission, by other carriers. So far as concerned private cars, the rule was, in substance, adopted, during federal control, by the Railroad Administration. Car Service Circular 31—effective October 10, 1918; revised December 23, 1919. Upon the termination of federal control, the Commission issued a notice to carriers and shippers (dated March 2, 1920) recommending "that until experience and careful study demonstrated that other rules would be more effective and beneficial," the uniform rule contained in that circular should be continued in effect. Later (April 15, 1920), it recommended that the Hocking Valley-Traer rule be applied by the carriers also to railroad fuel cars. But no uniform rule concerning assigned cars applicable to all carriers had been prescribed by the Commission until the entry of the order here complained of; and much diversity in practice existed. Many of the railroads had secured their coal during periods of car shortage without resort to the use of assigned cars; and one, at least, of the leading bituminous coal carriers of the United States declines to permit the use of any assigned cars on its lines.

The rule here assailed was the fruit of an investigation commenced by the Commission of its own motion, in March, 1921, with a view to prescribing just and reasonable rules applicable to all carriers concerning the use of assigned cars for bituminous coal. Every carrier subject to its jurisdiction was made a respondent. Private coal car owners, coal mine operators, coal miners, coal distributors and large coal consumers became parties by intervention. The evidence introduced occupied nearly 6,000 pages. The investigation extended over four years. The reports of the Commission on the original hearing and the rehearing occupy 117 pages of the record. It concluded that the practices expressed in the Hocking Valley-Traer rule, and other existing regulations of carriers, resulted in unjust discrimination and were unreasonable. It ordered that the carriers cease and desist from such practices. And it prescribed the uniform rule which prohibits any carrier from placing for loading at any mine more than that mine's rateable share of all cars, including assigned cars, available for use in the district; unless the carrier is permitted to place more by an emergency order issued by the Commission pursuant to par. (15) of § 1 of the Interstate Commerce Act as amended by § 402 of the Transportation Act, Feb-

ruary 28, 1920, c. 91, 41 Stat. 456, 477. This rule requires that, in determining how many cars are available in the district, the carrier placing the cars shall count all cars; that is, it must include with those owned by it, all owned by foreign railroads and assigned for their fuel service and likewise all owned by private shippers and assigned for their service. Thus, the prohibition embodied in the rule applies to all carriers, whatever the character of the consignor or consignee, and whatever the use to which the coal is to be put.

The operation of the uniform rule may be illustrated by the following example: Assume that there are in the district 10 mines each with a rating, or capacity, of 20 cars a day; that of the 200 cars needed to fill the district's requirement only 100 cars are available on a particular day; and that of the 100, only 85 are owned by the railroad, the remaining 15 being owned by Mine A. Under the rule, the share of each mine would be 10 cars. Mine A would be permitted to have placed its own cars, but only 10 of them. If, on the other hand, 95 of the 100 cars had been owned by the carrier, and only 5 by Mine A, there would be placed at its mine, in addition to its own 5 cars, 5 of the carrier's so-called system cars. The rule does not divert the surplus of cars owned by one shipper to use by another. It merely puts a restriction upon the use of the private car by limiting the number of the so-called assigned cars, which may be placed at a particular mine at a particular time. The owner may use the surplus elsewhere. Or he may lease the surplus cars to the carrier or to another shipper. The operation of the rule upon assigned railroad fuel cars is precisely similar. The limitation is imposed in order to improve the service and to prevent any mine (including one operated by a railroad) from securing, at the particular time, more than its rateable share of the aggregate available coal transportation facilities.

The order here assailed differs from the Hocking Valley-Traer rule approved in *Interstate Commerce Commission v. Illinois Central R. Co.*, *supra*, in two respects. Under the Hocking Valley-Traer rule the carrier was permitted to place at a mine all the cars (whether private or railway fuel cars) which had been assigned to it, even if the number assigned exceeded its pro rata of all available cars. The prohibition formerly imposed was merely upon placing at a mine any system cars, if it had its full quota from assigned cars. Under the rule here assailed, the carrier is prohibited from placing at a mine more cars than its pro rata, even if all sought to be placed are assigned private cars or railway fuel cars. Moreover, the rule here assailed is a uniform rule governing all carriers without regard to their particular circumstances, whereas the Hocking Valley-Traer cases prescribed a practice for the individual carrier after it had been found, upon specific enquiry, that the carrier had been guilty of undue discrimination. Thus, the

earlier orders were in their nature largely judicial. The order here attacked is wholly legislative.

No question is here involved concerning those rules, regulations or practices of the carriers by which the ratings of the several mines are determined. See *In re Rules Governing Ratings of Coal Mines, etc.*, 95 I. C. C. 309. No question is raised concerning the limits of the districts into which the carriers' lines are divided for the purpose of applying the rule. No question is raised concerning the adequacy of the supply of system cars. See *Car Shortage, etc.*, 12 I. C. C. 561; *Car Supply Investigation*, 42 I. C. C. 657. Nor is any question presented here concerning the compensation of, or allowance to, private car owners for the use of their cars in performing the transportation under the tariffs. See *Matter of Private Cars*, 50 I. C. C. 652. . . . The sole question requiring consideration is the validity of the requirement that, unless permission is given by the Commission, carriers shall, in placing assigned cars, be limited to the mine's quota, although the number of cars assigned to it exceeds the quota.

The order is challenged on several grounds. All of the plaintiffs insist that in prescribing a universal rule, the Commission has exceeded the powers conferred by Congress. All of the plaintiffs appear to attack the rule also on the ground that it is inherently unreasonable. Some insist that the order is unsupported by the findings and the evidence. Some that the rule involves a taking of property without due process of law. The private car owners urge specifically that the rule is an arbitrary interference with the use of their own property. The railroads urge especially that the rule is an illegal interference with their right to manage their own affairs. . . .

It is contended that the rule prescribed is void because unreasonable. Most of the evidence and much of the briefs and arguments were directed to showing the hardships, waste and losses which would result from the prescribed restriction on the use of assigned cars. Private car owners urge that assigned car mines will be compelled to reduce loadings to conform to the average of system car mines; that private coal cars, representing large investment and sorely needed by their owners, will stand idle on the tracks, that steel industries will be partially or completely shut down and thousands of steel workers will be thrown out of employment, that coke and by-product companies will be partially or completely shut down and their employees temporarily deprived of their means of livelihood; that public utility companies will be compelled to resort to the unsatisfactory and uneconomic spot market for coal; that the supply of gas and electricity to the public will be seriously curtailed; that coal burning steamships will be delayed in sailing; and that the further development and expansion of the important by-product coke process will cease. The railroads urge that the prescribed rule will deprive them of the only effective means of

procuring at all times, in dependable volume, suitable coal essential to their operation; that it will increase the cost of coal to them by preventing their running at full capacity the mines owned by them or those whose product they contract for; that it will increase the cost of operation also by depriving them of coal of uniform and approved quality; that in times of greatest car shortage it will involve the non-use by them of a large number of unused private cars; and that it will otherwise prevent efficient transportation service.

There was much evidence that the practice which had been sanctioned in the Hocking Valley-Traer cases did not operate satisfactorily. The Commission concluded that it was "not the fruition of ripe experience." Compare *Hillsdale Coal & Coke Co. v. Pennsylvania R. Co.*, 19 I. C. C. 356, 387. The effort to formulate a rule which would prevent discrimination was resumed. The Commission found that the existing assigned-car practice reduces to a certain extent the supply of cars furnished to commercial mines; that the larger and steadier supply of cars gives the assigned-car mines a great advantage in steadiness of operation, and hence in cost of production, in the selling markets, and in the labor market; and that, apart from the discrimination inherent in the assigned-car rule, the carriers have been guilty of other willful discriminatory practices, which, as a practical matter, it would be difficult to prevent as long as the rule prevailed. It found also that the use of private cars tends more and more to produce inequalities in the use of other facilities, such as locomotives, tracks, and terminals; and that many, at least, of the so-called car shortages have been due not to an absence of cars but to an inability to move them, i. e., to a shortage of such other facilities. It found, also, that the railroads could, by various devices, obviate most of the difficulty in securing fuel, which they anticipated would result from the order here attacked.

The argument most strongly urged is that, because the rule prescribes absolute uniformity, regardless of the necessities of the railroad or other consumer, regardless of the ownership of the mine or the cars, regardless of the character of the business done by the mine or its customer, it is necessarily unreasonable, and, hence, that the order is void. But the authority to establish reasonable rules conferred by paragraph (14) includes power to prescribe a rule of universal application. There was ample evidence to support the Commission's findings. It is not for courts to weigh the evidence introduced before the Commission, *Western Papermakers' Chemical Co. v. United States*, 271 U. S. 268, 271; or to inquire into the soundness of the reasoning by which its conclusions are reached, *Interstate Commerce Commission v. Illinois Central R. R. Co.*, 215 U. S. 452, 471; *Skinner & Eddy Corp. v. United States*, 249 U. S. 557, 562; or to question the wisdom of regulations which it prescribes. *United States v. New River Co.*, 265 U. S. 533, 542.



These are matters left by Congress to the administrative "tribunal appointed by law and informed by experience." *Illinois Central R. Co. v. Interstate Commerce Commission*, 206 U. S. 441, 454.

We cannot say that it was arbitrary and unreasonable for the Commission to conclude that good service could be secured by a uniform rule which might be departed from with its consent and that unjust discrimination could not be prevented without such a uniform rule. It acted in the light of a rich experience. It had learned by experience that the existing practices resulted in discrimination and unsatisfactory service. It had learned, also through experience, that the emergency powers conferred by the Transportation Act, 1920, afforded adequate means of supplying the needs and of averting the possible hardships and losses, of carriers and of private coal consumers, to which the evidence and arguments had been largely directed. For the Commission had had much experience in applying these emergency powers in connection with this distribution of coal cars in times of car shortage, before it prescribed the rule here challenged. Moreover, so far as concerns railroad fuel cars, the operation of the rule as modified from time to time by emergency orders would resemble the practice of the Car Service Section of the Railroad Administration during federal control.

The contention that findings of the Commission concerning discrimination were unsupported by evidence, or that findings essential to the order are lacking, rests largely upon a misconception. This objection was directed particularly to the finding that the existing practice in regard to assigned cars results in giving to the mines enjoying assigned cars an unjust and unreasonable share of railroad services and of facilities other than cars. The claim is that the evidence, upon which the finding of the resulting discrimination in those other transportation facilities rests, relates to only a few carriers, and that the general finding to that effect is without support, because the evidence introduced was not shown to be typical. Compare *New England Divisions Case*, 261 U. S. 184, 196-197; *United States v. Abilene & Southern Ry. Co.*, 265 U. S. 274, 291. The argument overlooks the difference in the character between a general rule prescribed under paragraph (12) and a practice for particular carriers ordered or prohibited under §§ 1, 3 and 15 of the Interstate Commerce Act. In the cases cited, the Commission was determining the relative rights of the several carriers in a joint rate. It was making a partition; and it performed a function *quasi-judicial* in its nature. In the case at bar, the function exercised by the Commission is wholly legislative. Its authority to legislate is limited to establishing a reasonable rule. But in establishing a rule of general application, it is not a condition of its validity that there be adduced evidence of its appropriateness in respect to every railroad to which it will be applicable. In this connection, the Commission, like other legislators, may reason from the particular to the general. . . .

The order challenged is valid. The bills must be dismissed. The decrees are reversed.<sup>10</sup>

**Chicago, Milwaukee & St. Paul Ry. Co. v. Board of Railroad Commissioners, Supreme Court of Montana, 1926. 76 Mont. 305, 247 Pac. 162.**

CALLAWAY, C. J. This action was brought by the plaintiff railway company in the District Court of Silver Bow County (the city of Butte being the principal place of business of plaintiff in Montana) to review and annul an order of the defendant Board directing the installation of an industrial spur track near Roundup, and to enjoin further proceedings thereunder. The Board filed a general demurrer to the complaint, which, being overruled, it refused to plead further. Thereupon defendant's default was entered and judgment was entered in favor of the plaintiff, from which the Board has appealed. . . .

Counsel agree that the order complained of is based upon section 3833, R. C. 1921, which reads as follows:

"The Board of Railroad Commissioners of the State of Montana shall have power and authority, after such investigation as they may deem necessary, and under such rules and regulations as they may establish with reference thereto, to compel railroads or railways or other companies or corporations operating and holding themselves out to be common carriers in the state of Montana, to extend or construct commercial or industrial spurs from constructed lines or tracks at stations or from within station limits; provided, the length of such commercial

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<sup>10</sup> In *Norwegian Nitrogen Products Co. v. United States*, 288 U. S. 294, 77 L. Ed. 796, 53 S. Ct. 350 (1933), the question was raised as to whether or not the action of the United States Tariff Commission under the flexible tariff provisions of the Tariff Act of 1922 should be accompanied by a judicial type of notice and hearing. The act gave authority to the President to increase or decrease the rates of duty specified in the act if he found upon investigation that increase or decrease was necessary in order to equalize the difference in the cost of production in the United States and elsewhere. The President acted upon the findings of the Commission after investigation by it. The statute provides that "the Commission shall give reasonable public notice of the hearings and shall give reasonable opportunity to parties interested to be present, to produce evidence, and to be heard."

In spite of this language the court held that the Commission was not obliged to afford a judicial type of hearing. Said the court, "What is done by the Tariff Commission and the President in changing the tariff rates to conform to new conditions is in substance a delegation, though a permissible one, of the legislative process. *Hampton & Co. v. United States*, 276 U. S. 394, 48 S. Ct. 348 (1928); *Buttfield v. Stranahan*, 192 U. S. 470, 24 S. Ct. 349 (1904); *Field v. Clark*, 143 U. S. 649, 12 S. Ct. 495 (1892). The inference is, therefore, a strong one that the kind of hearing assured by the statute to those affected by the change is a hearing of the same order as has been given by congressional committees when the legislative process was in the hand of Congress and no one else."

or industrial spurs or tracks shall be not to exceed two miles from the headblock to end of track."

This statute is attacked by the plaintiff as unconstitutional upon several grounds, the chief of which is that it assumes to delegate legislative powers to the Board of Railroad Commissioners. With this main objection the others are interwoven. . . .

Necessarily, the extent of the course of procedure and of the rules of decision are for the determination of the legislature. We think the correct rule as deduced from the better authorities is that if an act but authorizes the administrative officer or board to carry out the definitely expressed will of the legislature, although procedural directions and the things to be done are specified only in general terms, it is not vulnerable to the criticism that it carries a delegation of legislative power.

But the power must not be so arbitrary in character as to transgress the "due process clause" of the state or national Constitution. It would be difficult to couch a statute in more general terms than those employed in the one we are considering. Counsel for plaintiff are justified in saying that whether or not a hearing shall be ordered and the carrier afforded an opportunity to introduce testimony relative to the necessity of propriety of an order requiring construction, or whether the investigation shall be *ex parte*, is left entirely to the Board itself. The statute does not undertake, even in the most general terms, to prescribe the conditions under which the Board may compel the carrier to construct a spur. It does not provide that the Board may issue its order when reasonable public necessity requires it; there is no indicated rule of decision. It does not require as a condition to the making of the order that the Board shall give the carrier notice and a hearing; it does not contain even that procedural direction. On the contrary, it assumes to authorize the Board only after such investigation as they may deem necessary, and under such rules and regulations as they may establish with reference thereto to compel common carriers to extend and construct commercial or industrial spurs.

The intention of the legislature in passing this statute is not easy to determine. Did it intend to depart from a well-established policy? When chapter 135 of the Laws of 1917, now section 3833, *supra*, was passed, chapter 136 of the Laws of 1909 (Session Laws 1909, p. 204), sections 3827 to 3832, inclusive, R. C. 1921, was upon the statute books. Sections 3827, 3828, and 3829 assumed to confer authority upon the Railroad Commission to do certain acts using the express words, "after notice and hearing." Section 3829 assumed to give the Commission authority to compel railroad companies to construct certain industrial or commercial spurs "after notice and hearing." The applicability of section 3829 to the present proceeding has neither been suggested nor argued by counsel, and we expressly reserve an opinion with respect to it. If, however, the legislature, in enacting chapter 135 of the Laws

of 1917, now section 3833, intended to substitute that section for section 3829, it would appear that it intended to do away with the provision for notice and hearing, and to substitute in lieu thereof the discretion of the Board—in effect permitting that body to determine whether it would give notice of the proceeding and whether it would accord to the carrier a hearing.

When we conceive that the Board's order to the carrier to construct the spur track is in effect a taking of property, for it requires the carrier to use its property and spend its money (*Washington ex rel. Oregon R. & Nav. Co. v. Fairchild*, 224 U. S. 510, 56 L. Ed. 863, 32 Sup. Ct. 535), it would seem clear that an order to the carrier made without notice and without a hearing in effect would deprive the carrier of its property without due process of law. Before a valid order of the character in question can be made, we hold that notice and opportunity to be heard is indispensable. *Missouri P. R. Co. v. Nebraska*, 217 U. S. 196, 54 L. Ed. 727, 30 Sup. Ct. 461, 18 Ann. Cas. 989; *Union Lime Co. v. Railroad Commission*, 144 Wis. 523, 129 N. W. 605; *Wichita R. & Light Co. v. Public Utilities Commission*, 260 U. S. 48, 67 L. Ed. 124, 43 S. Ct. 51.

While it is true, abstractly, that notice and opportunity for a hearing are not essential to the validity of legislative enactments, such legislation nevertheless may be invalid as violative of the 14th Amendment because arbitrary, unjust, and unreasonable. A statute which undertakes to deprive a person of his property without notice and opportunity to be heard certainly is invalid. *Chicago, M. & St. P. R. Co. v. Minnesota*, 134 U. S. 418, 33 L. Ed. 970, 10 Sup. Ct. 462, 3 Inters. Com. Rep. 209.

The legislature itself may not deprive a person of his property without due process of law and with reason quite as strong it cannot authorize its creature to do what it cannot do itself. . . .

Whatever may be the rule generally, where the taking of property is involved extra-official or casual notice of a hearing granted as a matter of favor or discretion cannot be deemed a substantial substitute for the due process of law the Constitution requires. This is the holding of the Supreme Court of the United States in *Coe v. Armour Fertilizer Works*, 237 U. S. 413. The court also said: "In *Stuart v. Palmer*, 74 N. Y. 183, which involved the validity of a statute providing for assessing the expense of a local improvement upon the lands benefited, but without notice to the owner, the court said: 'It is not enough that the owners may by chance have notice, or that they may as a matter of favor have a hearing. The law must require notice to them, and give them the right to a hearing and an opportunity to be heard.' The soundness of this doctrine has repeatedly been recognized by this court. . . ."

The constitutional validity of a law is to be tested not by what has been done under it, but by what may be done under it. (*State ex rel.*

Redman v. Meyers, 65 Mont. 124, 210 Pac. 1064; State ex rel. Holliday v. O'Leary, 43 Mont. 157, 115 Pac. 204.) It must be borne in mind that the board of railroad commissioners is not a mere fact-finding instrumentality of the government. It is a *quasi-judicial* body with power to hear and determine controversies and to make lawful orders based upon its findings.

Where property is sought to be taken under an administrative regulation the defendant must not be denied the right to show that, as matter of law, the order is so arbitrary, unjust and unreasonable as to amount to a deprivation of property in violation of the Fourteenth Amendment. . . .

We have been discussing the character of the statute, not the actions of the board. It is fair to say the board was duly mindful of the necessity of notice and hearing.

For the reasons foregoing, however, the statute cannot be sustained; it is unconstitutional beyond a reasonable doubt. The action of the district court in overruling the demurrer was right, and its judgment is affirmed.

Affirmed.''

#### **Notice in Connection with Rule Making.**

Many courts formerly said (and the statement may still be found in some texts, and perhaps in some fairly recent court opinions) that notice and hearing is necessary where the agency exercises judicial functions, but is not required where legislative, or rule-making, functions are exercised. Is this correct?

With respect to The Assigned Car Cases, *supra*, it might be said (by those who seek to support the above suggestion) that notice and hearing was not required because a rule-making function was involved. Did the court so hold, or did it hold only that less formal notice was sufficient, in rule-making cases?

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' ' Rate making is characterized as legislative by the federal courts and by some of the state courts. May a rate be fixed by a utility commission without first affording a hearing? See *Chicago, M. & St. P. R. Co. v. Minnesota*, 134 U. S. 418, 33 L. Ed. 970, 10 S. Ct. 462, 702 (1890) (which really does not give a satisfactory answer to the question because the opinion is susceptible of two interpretations); *Indiana General Service Co. v. McCardle*, 1 F. Supp. 113 (1932) (emergency rate order reducing rates twenty per cent based upon wholly inadequate hearing); *Tri-State Telephone & Telegraph Co. v. Benson* (U. S. D. C. Minn.), P. U. R. 1933A, 38.

Section 18-a of the New York Public Service Law (N. Y. Consol. L. ch. 48, § 18-a) provides that "whenever the Public Service Commission . . . shall deem it necessary in order to carry out its statutory duties, to investigate . . . any public utility, such public utility shall be charged with and pay such portion of the compensation and expenses of the Commission . . . as is reasonably attributable to such investigation."

Must there be a hearing afforded before the Commission may decide to investigate a public utility? Before the pro rata share of expenses is assessed? *Bronx Gas & Electric Co. v. Maltbie*, 268 N. Y. 278, 197 N. E. 281 (1935).

Is the decision in *The Assigned Car Cases* consistent with the ruling in *Western Union Telegraph Co. v. Industrial Commission of Minnesota*, (D. C. Minn., 1938), 24 F. Supp. 370, holding that notice and hearing was necessary in fixing wage rates?

How about *Chicago, Milwaukee & St. Paul Ry. Co. v. Board*, *supra*? Is this consistent with the principle that notice and hearing is unnecessary, where the agency exercises rule-making functions?

What is your conclusion as to the necessity of notice and hearing, in rule-making cases?

The fixing of rates is ordinarily deemed to be legislative, or in the nature of rule-making. Should notice and hearing be required in rate-fixing cases? Suppose the Office of Price Administration is fixing the rates that may be charged for half-soled shoes? Suppose a state public utilities commission is fixing the rates that may be charged by an electric company?

In one case, a commission was authorized to fix insurance rates on the basis of ex parte investigation, but provision was made that the insurance companies could obtain a hearing by seeking judicial review of the rates as fixed. Would this be sufficient? See *Jordan v. American Eagle Fire Insurance Co.* (Ct. App. D. C., 1948), 169 F. (2d) 281.

Is there a difference between constitutional requirements and those imposed by the Federal Administrative Procedure Act, with respect to the necessity of notice and hearing, in cases where an agency exercises rule-making powers?

**Federal Communications Commission v. WJR, The Goodwill Station, Inc., 1949. 337 U. S. 265, 93 L. Ed. 1353, 69 S. Ct. 1097.**

MR. JUSTICE RUTLEDGE delivered the opinion of the court.

Most broadly stated, the important question presented by this case is the extent to which due process of law, as guaranteed by the Fifth Amendment, requires federal administrative tribunals to accord the right of oral argument to one claiming to be adversely affected by their action, more particularly upon questions of law. . . .

Involved in the controversy are two radio stations and the Commission, which is the petitioner here. One of the stations is the respondent WJR. It is licensed by the Commission as a "Class I-A Station," to broadcast day and night from Detroit, Michigan, on a frequency of 760 kilocycles and with a strength of 50 kilowatts. The other station is the intervenor, Coastal Plains (formerly Tarboro) Broadcasting Company.

Prior to August 22, 1946, Tarboro filed written application with the Commission for a permit to construct a "Class II Station" to broadcast from Tarboro, North Carolina. On that date the Commission granted the application. . . . The construction permit was granted without notice to WJR and without oral hearing or other participation by it in the proceedings before the Commission.

On September 10 following, WJR filed with the Commission a written "Petition for reconsideration and hearing." . . .

. . . WJR asked that the Commission hold a hearing on the Coastal Plains application to which WJR might be made a party or, in the alternative, postpone final action on the Coastal Plains application until the conclusion of the then pending "Clear Channel" proceeding. In that proceeding, essentially legislative in character, the Commission was considering the desirability of changing its rules so as to allow WJR and other stations to increase their broadcast strengths to 500 kilowatts. The basis for the alternative request was WJR's fear that a grant of the Coastal Plains construction permit might prejudice a possible future WJR application for increased signal strength in the event the decision in the clear channel proceeding should so modify the Commission's rules as to facilitate such an application.

. . . On December 17, 1946, the Commission denied WJR's application in a written opinion, rendered without prior oral argument. . . .

Obviously the most important question is the Court of Appeals' ruling that Fifth Amendment due process required the Commission to afford respondent an opportunity for oral argument upon its petition for reconsideration of Coastal Plains' application, together with its grounding of that ruling in the even broader one that such an opportunity is an inherent element of procedural due process in all judicial or quasi-judicial, i.e., administrative, determinations of questions of law, outside of such questions as may arise upon interlocutory matters involving stays *pendente lite*, temporary injunctions and the like.

Taken at its literal and explicit import, the Court's broad constitutional ruling cannot be sustained. So taken, it would require oral argument upon every question of law, apart from the excluded interlocutory matters, arising in administrative proceedings of every sort. This would be regardless of whether the legal question were substantial or insubstantial; of the substantive nature of the asserted right or interest involved; of whether Congress had provided a procedure, relating to the particular interest, requiring oral argument or allowing it to be dispensed with; and regardless of the fact that full opportunity for judicial review may be available.

We do not stop to consider the effects of such a ruling, if accepted, upon the work of the vast and varied administrative as well as judicial tribunals of the federal system and the equally numerous and diversified interests affected by their functioning; or indeed upon the many and different types of administrative and judicial procedures which Congress has provided for dealing adjudicatively with such interests. It is enough to say that due process of law, as conceived by the Fifth Amendment, has never been cast in so rigid and all-inclusive confinement.

On the contrary, due process of law has never been a term of fixed and invariable content. This is as true with reference to oral argu-

ment as with respect to other elements of procedural due process. For this Court has held in some situations that such argument is essential to a fair hearing, *Londoner v. Denver*, 210 U. S. 373, in others that argument submitted in writing is sufficient. *Morgan v. United States*, 298 U. S. 468, 481. See also *Johnson & Wimsatt v. Hazen*, 69 App. D. C. 151; *Mitchell v. Reichelderfer*, 61 App. D. C. 50.

The decisions cited are sufficient to show that the broad generalization made by the Court of Appeals is not the law. Rather it is in conflict with this Court's rulings, in effect, that the right of oral argument as a matter of procedural due process varies from case to case in accordance with differing circumstances, as do other procedural regulations. Certainly the Constitution does not require oral argument in all cases where only insubstantial or frivolous questions of law, or indeed even substantial ones, are raised. Equally certainly it has left wide discretion to Congress in creating the procedures to be followed in both administrative and judicial proceedings, as well as in their conjunction.

Without in any sense discounting the value of oral argument wherever it may be appropriate or, by virtue of the particular circumstances, constitutionally required, we cannot accept the broad formula upon which the Court of Appeals rested its ruling. To do so would do violence not only to our own former decisions but also, we think, to the constitutional power of Congress to devise differing administrative and legal procedures appropriate for the disposition of issues affecting interests widely varying in kind.

It follows also that we should not undertake in this case to generalize more broadly than the particular circumstances require upon when and under what circumstances procedural due process may require oral argument. That is not a matter, under our decisions, for broadside generalization and indiscriminate application. It is rather one for case-to-case determination, through which alone account may be taken of differences in the particular interests affected, circumstances involved, and procedures prescribed by Congress for dealing with them. Only thus may the judgment of Congress, expressed pursuant to its power under the Constitution to devise both judicial and administrative procedures, be taken into account. Any other approach would be, in these respects, highly abstract, indeed largely in a vacuum.

Descending to the concrete setting of this case in the provisions of the Communications Act, we are unable to conclude that the procedure Congress has provided for determination of the questions respondent raises affords any semblance of due process deficiency.

The statute itself provides in terms for oral argument before the Commission in a single situation only, namely, in proceedings heard initially before an examiner under § 409(a). That provision however has no pertinence to this case. . . .



Congress, we think, has committed to the Commission's discretion, by the terms of § 312 (b) and § 4 (j) of the Communications Act, the questions whether and under what circumstances it will allow or require oral argument, except where the Act itself expressly requires it. . . .

Respondent does not contend that it was denied any opportunity to present for the Commission's consideration any matter of fact or law in connection with its application or that the Commission has not given all matters submitted by it due and full consideration. We cannot say, in view of the statute and of the subject matter involved, that the Commission abused its discretion in hearing respondent's application on the written submission.<sup>12</sup>

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### Licensing Proceedings

**State ex rel. Nowotny v. City of Milwaukee, Supreme Court of Wisconsin, 1909. 140 Wis. 38, 121 N. W. 658.**

WINSLOW, C. J. The health commissioner of Milwaukee granted the relator a license to peddle milk in said city for one year, the license being by its terms "subject to revocation" according to the provisions of the city ordinances. The license having been in form revoked by the health commissioner because relator had been convicted of selling impure milk, the relator brought an action of certiorari in the circuit court and the action of the commissioner was reversed, whereupon the city and the health commissioner appealed to this court.

The question is whether the revocation was lawful. In addition to broad general police powers, the common council of the city of Milwaukee had power under the city charter "to regulate and restrain the sale of . . . milk," also to "tax, license, regulate, and restrain . . . vendors of milk; to fix and regulate the amount of license under this subdivision," etc. Subds. 9 and 40, sec. 3, ch. 4, Charter of Milwaukee, being ch. 184, Laws of 1874, as amended. By ch. 13 of the charter, the duties of the commissioner of health are defined and made very broad and sweeping. He is given power to summarily abate nuisances of all kinds, destroy diseased or infected food, clothing, and other like articles, establish temporary hospitals in case of epidemics, and, in fine, to exercise very broad and autocratic powers in all matters relating to the conservation of the public health, and sec. 16 of the chapter further provides that the council may "further define" his duties and pass such ordinances in aid of his duties as may tend to promote and secure the general health of the inhabitants of the city.

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<sup>12</sup> The decision is noted in 21 Miss. L. J. 276 (1950), 25 Notre Dame Lawy. 353 (1950), 23 So. Calif. L. Rev. 77 (1950).

A health officer who is expected to accomplish any results must necessarily possess large powers and be endowed with the right to take summary action, which at times must trench closely upon despotic rule. The public health cannot wait upon the slow processes of a legislative body or the leisurely deliberation of a court. Executive boards or officers who can deal at once with the emergency under general principles laid down by the lawmaking body must exist if the public health is to be preserved in great cities. *Lowe v. Conroy*, 120 Wis. 151, 97 N. W. 942. It is well said in *People ex rel. Lieberman v. Vandecarr*, 175 N. Y. 440, 67 N. E. 913:

"The vesting of powers more or less arbitrary in various officials and boards is necessary if the work of prevention and regulation is to ward off fevers, pestilence, and the many other ills that constantly menace great centers of population."

There is nothing of greater importance relating to the food supply of a great city than that the milk sold should be pure and wholesome, and the common council of Milwaukee, realizing this fact, and realizing also that it was imperative that action should be quick and decisive if it is to be efficient, passed ordinances requiring under penalties that all milk sold must be unadulterated, must meet certain standards, and be obtained from healthy cows fed upon wholesome feed, and further requiring that every milk vendor must obtain a license from the health commissioner, "which license may at any time be revoked by the commissioner of health for violation of the provisions hereof, or for any good or sufficient cause." We are convinced that the council had power to pass the ordinance and vest the power of issuing and revoking licenses in the health commissioner by virtue of the power to "tax, regulate, and restrain" the "vendors of milk," and to "regulate and restrain the sale of milk," given to it by the city charter.

The requiring of licenses and reserving of the power to revoke such licenses, in case of misconduct or violation of law, is well recognized as one of the most effective means of regulating and restraining a business that has yet been discovered, but the power of revocation would amount to little if it could not be vested in an executive officer or board with power to act quickly. The sale of infected milk for a single hour might produce an epidemic of typhoid fever which would sweep hundreds to the grave. The importance of reserving in some executive official the power to revoke can hardly be overestimated. Prosecutions to recover fines and penalties may drag their weary lengths along for weeks and months and even then prove ineffective; but the revocation of the license remedies the evil and avoids the danger of the spreading of disease at once. It is regulation in the most effective sense. We have no hesitation in holding that when the city was given the power to license, restrain, and regulate the sale of

milk it also took power to revoke licenses, and that it might vest such power in the health commissioner with the right to exercise the same summarily and even without notice. *McQuillin*, Mun. Ord., § 420, and cases cited; *Child v. Bemus*, 17 R. I. 230, 21 Atl. 539, 12 L. R. A. 57. . . .

By the court.—Judgment reversed, and action remanded with directions to quash the writ of certiorari.<sup>13</sup>

<sup>13</sup> Does the principal case *really* involve the revocation of a license without notice and hearing, as the court assumes? The agency took action only after the licensee had been convicted in a criminal court on charges of selling impure milk—did not these criminal proceedings afford the licensee an adequate opportunity to be heard (particularly in view of the fact that it seems altogether probable that the health commissioner might have played an important role in the prosecution of the criminal case)?

Quite a number of decisions say, by way of *dicta* at least, that in case of grave danger to the public health or morals, a license may be revoked without notice and hearing. Thus, in *People ex rel. Ritter v. Wallace*, 160 App. Div. 787, 145 N. Y. Supp. 1041 (1914), involving a dance hall license, in which there was no express requirement concerning notice and hearing, revocation was permitted without such procedure primarily because of the menacing character of the business. [Cf. *Eastwood Park Amusement Co. v. Stark*, 325 Mich. 60, 38 N. W. (2d) 77 (1949), requiring notice and hearing in proceedings to revoke the license of an amusement park.]

Permitting the revocation of a license to carry on a business without notice and hearing produces results that to say the least are extremely harsh, from the viewpoint of the licensee. Could the hardship be alleviated by providing that in case of extreme urgency a license could be temporarily *suspended* without notice, and thereafter a hearing would be accorded, before the license was permanently *revoked*? In *Halsey, Stuart & Co. v. Public Service Commission of Wisconsin*, 212 Wis. 184, 248 N. W. 458 (1933), the court sustained temporary suspension of a stockbroker's license without hearing. However, in *Standard Airlines, Inc. v. Civil Aeronautics Board* (Ct. App. D. C. 1949), 177 F. (2d) 18, the court refused to permit the suspension of an air carrier license without hearing.

Compare these cases with the provisions of the Federal Administrative Act, with respect to the necessity of notice and hearing prior to the suspension or revocation of a license.

If the license expressly provides that it may be revoked without notice and hearing (or if the statute so provides), the provision is binding and no constitutional rights are invaded by its exercise, provided the business or occupation is one which the state or municipality in the exercise of its powers is entitled to regulate to the point of prohibition. *City of Grand Rapids v. Braudy*, 105 Mich. 670, 64 N. W. 29 (1895). Furthermore in the case of such business, if the license provides for revocation "at the pleasure of" or "in the discretion of" the revoking authority, some courts have held that no notice and hearing is required. *Commonwealth v. Kinsley*, 133 Mass. 578 (1882) (pool hall license); *Child v. Bemus*, 17 R. I. 230, 15 Atl. 539 (1891) (hackney license). On the other hand, if the statute expressly provides for a hearing, the requirement is mandatory and must be complied with. If the statute is ambiguous, the court will ordinarily construe it in favor of a notice and hearing. *Tanguay v. State Board of Public Roads*, 46 R. I. 134, 125 Atl. 293 (1924) (automobile driver's license). The real difficulties arise when the statute is silent in regard to the matter, and resort to implication is necessary.

**People ex rel. Lodes v. Department of Health, Court of Appeals of New York, 1907. 189 N. Y. 187, 82 N. E. 187.**

HAIGHT, J. On the 17th day of April, 1903, the board of health of the department of health of the city of New York issued to the relator, George Lodes, six permits to sell and deliver milk from wagons and from his store in the borough of Brooklyn, which permits were revoked by the board of health, without notice to him, on the 17th day of January, 1906. Thereupon the relator applied for a peremptory writ of mandamus to compel the board of health to rescind its action in revoking the permits, alleging that there was no public necessity for the revocation of the permits; that the action of the board was arbitrary and unreasonable, tyrannical and oppressive in the extreme, and beyond the power and authority conferred upon it by law. On the hearing of such application the board of health presented affidavits showing that the relator, his wife and the drivers of his wagons had been four times convicted of selling, or offering for sale, adulterated milk, and that their action in revoking his permits was based upon such repeated violations of the law, and that by reason thereof they deemed him an unfit person to traffic in milk. The Special Term granted the peremptory writ prayed for, and the affirmance of that order by the Appellate Division is now brought up for review.

The Sanitary Code of the city of New York, which was continued in force by the charter of the city (section 1172, chapter 466, Laws of 1901), provides: "Section 56. No milk shall be received, held, kept, offered for sale or delivered in the city of New York without a permit in writing, from the board of health and subject to the conditions thereof." . . .

The only question remaining to be disposed of is as to whether the relator was entitled to notice and a hearing by the board of health before revoking his permits. The answer to this question may depend upon the soundness of the relator's contention that the permits issued to him were property, of which under the Constitution, he cannot be deprived without due process of law. He maintains that he has established and built up a business of selling milk at his store and has a regular line of customers whom he supplies daily; that he has established a milk route over which his wagons are sent daily distributing milk to the inhabitants of the city in that locality, and that this established business has become property, of which he cannot be deprived. But the good will of his business, so established, must not be confounded with the permits granted to him to engage in that business. He was never licensed to sell impure and adulterated milk, and after he had obtained his permits to sell and undertook the securing of customers, he knew that he was engaging in a business which must be conducted under the supervision of the board of health of the city subject to the police powers

of the state, and that such permits were subject to revocation. He knew that the permits contained no contract between the state, or the board of health, and himself, giving him any vested right to continue the business, and that it would become the duty of the board to revoke his license, in case he violated the statute, or the conditions under which it was granted. Milk is an article of food extensively used by our inhabitants and is chiefly relied upon to support the lives of infant children. If impure or adulterated, or polluted with germs of dangerous or infectious diseases, its use becomes highly dangerous, and the health and welfare of the public demand speedy and, in some cases, instant prevention of its distribution to the people. While it is the duty of the board of health to watch and, through its inspectors, detect violations of the statute and the conditions imposed by it, it has been given no judicial power to hear, try and determine such violations, but must act upon the information obtained by it through its own channels of inquiry. In *Cooley's Constitutional Limitations* (7th Ed., p. 887) it is said that "Dealers may also be compelled to take out a license, and the license may be refused to a person of bad reputation, or be taken away from a party detected in dishonest practices." In *Crowley v. Christensen* (137 U. S. 86) MR. JUSTICE FIELD says: "It is undoubtedly true that it is the right of every citizen of the United States to pursue any lawful trade or business, under such restrictions as are imposed upon all persons of the same age, sex and condition. But the possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order and morals of the community." In *Dent v. West Virginia* (129 U. S. 114) the same justice, in speaking of the interest or estate acquired by persons, says: "It is often of great value to the possessors, and cannot be arbitrarily taken from them, any more than their real or personal property can thus be taken. But there is no arbitrary deprivation of such right where its exercise is not permitted because of a failure to comply with conditions imposed by the state for the protection of society. The power of the state to provide for the general welfare of its people authorizes it to prescribe all such regulations as, in its judgment, will secure or tend to secure them against the consequences of ignorance and incapacity as well as of deception and fraud." In the case of *Metropolitan Board of Excise v. Barrie* (34 N. Y. 667) WRIGHT, J., in delivering the opinion of the court says: "Licenses to sell liquors are not contracts between the state and the persons licensed, giving the latter vested rights, protected on general principles and by the Constitution of the United States against subsequent legislation; nor are they property in any legal or constitutional sense. They have neither the qualities of a contract nor of property, but are merely temporary permits to do what otherwise

would be an offense against a general law." In other words, a license is not a contract or property, but merely a temporary permit issued in the exercise of the police powers to do that which otherwise would be prohibited. (*Youngblood v. Sexton*, 32 Mich. 406; *Commonwealth v. Kinsley*, 133 Mass. 578.) . . .

We incline to the view that the authorities to which reference has been made are conclusive upon the subject; and, although the relator had established a business and secured customers under the permits granted to him, the permit itself cannot be treated as property in any legal or constitutional sense, but was a mere license revokable by the power that was authorized to issue it. The statute, as we have seen, has given the board of health no power to hear, try or determine cases. Its duties are, therefore, not judicial but executive or administrative, and at times must be exercised summarily, as was said in *Metropolitan Board of Health v. Heister* (37 N. Y. 661). "The power to be exercised by this board upon the subjects in question is not judicial in its character. It falls more properly under the head of an administrative duty." . . .

The powers of the members of the board of health being administrative merely, they can issue or revoke permits to sell milk in the exercise of their best judgment, upon or without notice, based upon such information as they may obtain through their own agencies, and their action is not subject to review either by appeal or by certiorari. (*Child v. Bemus*, 17 R. I. 230; *State ex rel. Cont. Ins. Co. v. Doyle*, 40 Wis. 220; *Wallace v. Mayor, etc., of Reno*, 63 L. R. A. 337.) If, however, their action is arbitrary, tyrannical and unreasonable, or is based upon false information, the relator may have a remedy through mandamus to right the wrong which he has suffered. If the relator can show that he and those acting for him have not been convicted of violating the statute and the conditions imposed in the granting of the permits, and that consequently he is a fit and proper person to engage in the sale and distribution of milk among the inhabitants of the city, then he would be entitled to the relief asked for. But if he desired to submit such evidence, he should have asked for an alternative rather than a peremptory writ. If, however, the charge of the board is true that he has been convicted of the offenses charged the number of times stated, the conclusion is irresistible that he was an improper person to be intrusted with the permit of the city, to dispense to the inhabitants of the city a food product that was liable, if adulterated, to endanger the health of the people. . . .

The order should be reversed and the application for a mandamus denied, with costs in all courts, unless the relator within twenty days elects to demand an alternative writ, in which case the proceedings should be remitted to the Special Term, and the costs should abide the final award of costs.

VANN, J. (dissenting). If the order revoking the license of the relator was an administrative act, no notice to him was required, but if it was an act done in the exercise of judicial power, notice and an opportunity to be heard were essential before he could be deprived of the right to carry on a lawful business. . . .

While summary action is often necessary in cases affecting the public health, still the danger from delay caused by giving short notice is less than the danger that may arise from action with no notice at all. The respondent should at least have had an opportunity to raise an issue as to whether he had ever been convicted by a court of competent jurisdiction of violating the Sanitary Code or to show that any judgment of conviction had been reversed or set aside.

Moreover, a license under the police power, as distinguished from the taxing power, involves the right to regulate but not to prohibit, and it cannot be exercised capriciously or arbitrarily. As the right to revoke is not expressly conferred, but is implied from the right to grant, the rule against arbitrary or capricious action applies with equal force to the revocation of licenses. One of the most effective safeguards against the arbitrary acts of public officials is an opportunity to be heard. The revocation of the respondent's license involved the destruction of his business which was useful, legitimate and profitable. Since the power to revoke is not expressly given, but is implied from the power to grant, I think the law also implies that notice must be given before an act can be done which involves such serious loss to the licensee. This involves the conclusion that the revocation of such a license as the one in question is in its essence judicial, independent of the statutory requirement that it shall be so regarded. I vote to affirm.

CULLEN, C. J., O'BRIEN, EDWARD T. BARTLETT, HISCOCK and CHASE, JJ., concur with HAIGHT, J.; VANN, J., reads dissenting opinion.

Order reversed, etc.<sup>14</sup>

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<sup>14</sup> See also the following cases in which the licenses contained no express provisions as to notice and hearing, and revocation was permitted without such procedure primarily because it was felt that no contract or property right was involved. *Wallace v. Mayor of Reno*, 27 Nev. 71, 73 Pac. 528 (1903) (liquor license); *McConkie v. Remley*, 119 Iowa 512, 93 N. W. 505 (1903) (liquor license). These cases may be compared with *Oceanic Steam Nav. Co. v. Stranahan*, 214 U. S. 320, 53 L. Ed. 1013, 29 S. Ct. 671 (1909), in which it was held that a fine might be imposed upon a steamship company, solely on the basis of the medical examination by departmental doctors, under a statute prohibiting the transportation to this country of persons afflicted with contagious diseases which were present and discoverable at the port of embarkation. There was held to be no deprivation of due process because of the plenary power of Congress over admission of aliens. Somewhat along the same line are the alien exclusion and deportation cases in which the hearing requirements, while present, are rather attenuated. See "Due Process Restrictions on Procedure in Alien Exclusion and Deportation Cases," 31 Columbia L. Rev. 1013 (1931).

**State v. Schultz, Supreme Court of Montana, 1892. 11 Mont. 429, 28 Pac. 643.**

BLAKE, C. J. The indictment alleges that the appellant Schultz, "on or about the fifteenth day of September, A. D. 1890, at the county of Silver Bow, in the State of Montana, wilfully, falsely, and unlawfully did assume upon himself to execute, exercise, and occupy the art, faculty, and science of a physician and surgeon, and then and there unlawfully did practice medicine, and did give, administer, apply, and prescribe medicine to one J. P. Jones (whose full Christian name is to the grand jury unknown), and to divers other persons (whose names are to the said grand jury unknown) afflicted with various infirmities and diseases, he, the said Carl J. Schultz, not having a certificate from the board of medical examiners of the State of Montana, or any member thereof, admitting, allowing, and qualifying him to then and there practice medicine, or any other legal right or authority so to do, contrary to the statute in such case made and provided." The jury returned a verdict of guilty, and judgment was entered thereon.

It appeared during the trial that the board of medical examiners issued October 4, 1889, to said Schultz, a certificate to practice medicine and surgery. The following proceedings were had April 1, 1890, by the board: "In the matter of Dr. Carl J. Schultz, of Butte, it appearing that he has violated his word of honor to abstain from former unprofessional conduct, in that he publicly advertised to cure or treat disease, injury, or deformity in such manner as to deceive the public, his certificate is declared revoked, and the secretary instructed to notify him of this action by the board." The secretary of the board afterwards sent to Schultz this letter:

"Great Falls, April 9, 1890.

"Dr. Carl J. Schultz, Butte, Montana—Dear Sir: I am instructed by the board of medical examiners of Montana to say that, it appearing from evidence before them that you have violated your pledge to abstain from unprofessional methods heretofore alleged against you, your certificate authorizing you to practice medicine and surgery in Montana is revoked.

"Very respectfully, your obedient servant,  
"Ernest Crutcher, Secretary."

At a regular session of the board, which was held prior to these proceedings, this resolution was adopted: "Resolved, that it is the sense of this board that advertising in any newspaper or journal, promising to cure any particular injury or disease of the body of any kind, for any sum of money, or any other consideration is unprofessional conduct, and shall be sufficient cause for the revocation of any certificate granted." No notice of any charge of unprofessional or dishonorable conduct was ever given to Schultz by any officer of the medical board or otherwise. The court below instructed the jury that this fact was



immaterial, and that the action of the board in that matter was valid, and could not be questioned by them. The court also refused to allow the defendant to prove that he had appealed from the decision of the board in revoking his certificate, and that the appeal was then pending in the District Court of the proper county.

The statute relating to this subject provides that the board may "revoke a certificate for unprofessional, dishonorable, or immoral conduct"; and that, in all cases of revocation, "the applicant, if he or she feels aggrieved, may appeal to the District Court of the county where such applicant may have applied for a certificate." It was assumed by the court below that the board possessed the power, under these clauses, of revoking the certificate of appellant without a notice of any charge preferred against him, or a hearing thereon. All the rulings conform to this view of the law, which is clearly erroneous, and subverts the most precious rights of the citizen. The principles which govern the disbarment of attorneys are analogous.

In *Ex parte Heyfron*, 7 How. (Miss.) 127, the court held that it is error to strike an attorney from the roll without giving him notice of the proceedings, and said: "It is a cardinal principle in the administration of justice that no man can be condemned or divested of his rights until he has had the opportunity of being heard." This case was approved in *People v. Turner*, 1 Cal. 150; 52 Am. Dec. 295, and the court, by MR. JUSTICE BENNETT, refers to the "power inherent in every court, which has the authority to admit attorneys to practice, of striking their names from the rolls, or as the order expresses it, of expelling them from the bar, whenever they are guilty of such conduct, either in or out of their profession, as shows them to be unfit persons to practice it." The learned judge then proceeded: "But where an attorney is proceeded against with this object, he is entitled to have notice of the charges against him, and an opportunity to make his defense. This is not only the dictate of natural justice, and the uniform practice in such cases, but it has been carried into an express adjudication in *Ex parte Heyfron*, 7 How. (Miss.) 127. In the case at bar, no notice of the charges upon which the order was made was given; no opportunity for explanation, apology, or defense was afforded; the judgment of the court was *ex parte*, and condemned the defendants without a hearing. It is barely necessary to add that a judgment thus rendered, partaking so strongly of the nature of a criminal proceeding, and so serious in its consequences, cannot be supported. . . . An attorney, by his admission as such, acquires rights of which he cannot be deprived, at the discretion of a court, any more than a physician of the practice of his profession, a mechanic of the exercise of his trade, or a merchant of the pursuit of his commercial avocations." (See, also, *Fletcher v. Daingerfield*, 20 Cal. 427; *Ex parte Garland*, 4 Wall. 378; *Ex parte Bradley*, 7 Wall. 364; *Ex parte Robinson*, 19 Wall. 512.) . . .

The case of *People v. McCoy*, 125 Ill. 289, is on all fours with that at bar, and the court construed a similar statute. We quote from the opinion of MR. JUSTICE SCOTT: "Treating the record of the board, in the matter of revoking the certificate that had been issued to defendant, as having the force of a proceeding in its nature judicial on the part of the board in a case where it had jurisdiction of the subject matter to be investigated, yet the present record is fatally defective, for the reason it is made to appear defendant had no notice of the proceedings proposed to be taken against him. The prosecution put defendant on the stand, and made him their own witness, and he distinctly stated, at their instance, that the notice found in the records was never in fact served upon him. The affidavit of service is not sufficient to overcome his testimony in that respect. It is contrary to the analogies of the law that a proceeding, in its nature judicial, should be obligatory and conclusive upon a person not a party thereto; otherwise a party might be deprived of important rights, with no opportunity to defend against wrongful accusations. Whether the right to practice law or medicine is property, in the technical sense, it is a valuable franchise, and one of which a person ought not to be deprived, without being offered an opportunity, by timely notice, to defend it." . . .

We are satisfied that the legislative assembly did not intend to clothe the medical board of the state with the arbitrary power to revoke the certificate of a physician, without a reasonable notice of the charge against him, and the time and place of the trial thereof. The statute, by its mere silence prescribing the procedure, cannot be so construed. The decision of the board in this matter is not final, and upon an appeal the courts may declare null and void its proceedings. No prosecution of this character can be maintained under these circumstances, and the appellant should have been allowed to prove that he had appealed from the decision of the board in revoking his certificate, and that the appeal was pending in the appropriate tribunal. The court below should have instructed the jury that the certificate which had been issued to the appellant had not been revoked, and was in full force.

It is ordered and adjudged that the judgment be reversed, and that the cause be remanded, with directions to grant the motion for a new trial.

Reversed.<sup>15</sup>

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<sup>15</sup> In the following additional cases the revocation of occupational licenses was held invalid for want of proper notice and hearing before revocation, although no express provision in the license or the pertinent statutes demanded it. *Abrams v. Jones*, 35 Idaho 532, 207 Pac. 724 (1922) (dentist's license); *Balling v. Board of Excise of the City of Elizabeth*, 79 N. J. L. 197, 74 Atl. 277 (1909) (tavern license); *Northern Cedar Co. v. French*, 131 Wash. 394, 230 Pac. 837 (1924) (commission merchant's license, the opinion clearly indicating that the court regards the absence of express provision for notice and hearing as rendering the statute unconstitutional); *Abrams v. Daugherty*, 60 Cal. App.

**Goldsmith v. United States Board of Tax Appeals, Supreme Court of the United States, 1925. 270 U. S. 117, 70 L. Ed. 494, 46 S. Ct. 215.**

MR. CHIEF JUSTICE TAFT delivered the opinion of the court.

H. Ely Goldsmith, a citizen of New York and qualified to practice as a certified public accountant by certificate issued under the laws of that state filed a petition in the Supreme Court of the District of Columbia, asking for a writ of mandamus against the United States Board of Tax Appeals, created by the Revenue Act of 1924 (43 Stat. 253, 336, title 9, § 900) to compel the board to enroll him as an attorney, with the right to practice before it, and to enjoin the board from interfering with his appearance before it in behalf of taxpayers whose interests are there being dealt with.

The petition avers that the board has published rules for admission of persons entitled to practice before it, by which attorneys at law admitted to courts of the United States and the states, and the District of Columbia, as well as certified public accountants duly qualified under the law of any state or the District are made eligible. The applicant is required to make a statement under oath, giving his name, residence, and the time and place of his admission to the bar, or of his qualification as a public accountant, and disclosing whether he has ever been disbarred, or his right to practice as a certified accountant has ever been revoked. The rules further provide that the board may in its discretion deny admission to any applicant, or suspend or disbar any person after admission.

The petitioner says that pursuant to these rules he made application showing that he was a public accountant of New York duly certified, and that his certificate was unrevoked; that he thereupon filed petitions for taxpayers, before the board, but that he was then advised, September 5, 1924, by the board, that the question of his admission to practice had been referred to a committee for investigation; that in due course he would be notified whether the committee desired him to appear before it, and of its action in the premises; and that on September 27 he received notice that his application had been received, considered, and denied. It does not appear that he made any further application to the board to be heard upon the question of his admission, but filed his petition for mandamus at once. In his petition, he denies the power of the board to make rules for admission of persons to practice before it.

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297, 212 Pac. 942 (1922) (securities broker; also based upon due process); *Riley & Co. v. Wright*, 151 Ga. 609, 107 S. E. 857 (1921) (insurance agent's license).

In the foregoing and similar cases it is not always possible to determine whether the result is based upon implications from the statutes or upon constitutional right. See Tuttrup, "Necessity of Notice and Hearing in the Revocation of Occupational Licenses," 4 Wis. L. Rev. 180 (1927).

Upon the filing of the petition, a judge of the Supreme Court of the District ordered a rule against the board to show cause. The members of the board answered the rule as if they were individual defendants, and set out at considerable length the discharge of the petitioner for improper conduct as examiner of municipal accounts in the office of state comptroller of New York (*People ex rel. Goldschmidt v. Travis*, 167 App. Div. 475; 219 N. Y. 589), and the rejection of the petitioner as an applicant for admission to practice in the Department of the Treasury because of improper advice to clients, as grounds upon which the committee and the board had denied his application to practice before it.

To this answer the petitioner replied consenting to the appearance of individual members of the board as defendants, denying some of the charges made, but averring that they were none of them competent evidence on the issue presented and were merely hearsay, and that the action in New York and in the Treasury Department was due to prejudice against him for doing his duty. To this reply the defendants demurred. Upon the issue thus presented, the Supreme Court dismissed the petition for mandamus.

The Court of Appeals of the District affirmed the judgment of the Supreme Court (4 F. (2d) 422), and the case has been brought here on error under section 250 of the Judicial Code as a case in which the construction of a law of the United States is drawn in question.

The chief issue made between the parties is whether the Board of Tax Appeals has power to adopt rules of practice before it by which it may limit those who appear before it to represent the interest of taxpayers to persons whom the board deem qualified to perform such service and to be of proper character.

The board is composed of members appointed by the President by and with the advice and consent of the Senate, with a chairman appointed by the board. It is charged with the duty of hearing and determining appeals from the Commissioner of Internal Revenue on questions of tax assessments for deficiencies in returns of taxpayers. Notice and opportunity to be heard is to be given to the taxpayer. Hearings before the board are to be open to the public. The board may subpoena witnesses, compel the production of papers and documents, and administer oaths. The duty of the board and each of its divisions into which it may be divided is to make a report in writing of its findings of fact and decision in each case. In any subsequent suit in court by the taxpayer to recover amounts paid under its decision, its findings of fact shall be *prima facie* evidence. It is further provided by the act that "the proceedings of the board and its divisions shall be conducted in accordance with such rules of evidence and procedure as the board may prescribe." The last sentence in the title providing

for the board is: "The board shall be an independent agency in the executive branch of the government."

We think that the character of the work to be done by the board, the *quasi*-judicial nature of its duties, the magnitude of the interests to be affected by its decisions, all require that those who represent the taxpayers in the hearings should be persons whose qualities as lawyers or accountants will secure proper service to their clients and to help the board in the discharge of its important duties. In most of the executive departments in which interests of individuals as claimants or taxpayers are to be passed on by executive officers or boards, authority is exercised to limit those who act for them as attorneys to persons of proper character and qualification to do so. Not infrequently, statutory provision is made for requiring a list of enrolled attorneys to which a practitioner must be admitted by the executive officer or tribunal. Act July 7, 1884, 23 Stat. 236, 258, c. 334; Act July 4, 1884, 23 Stat. 98, 101, c. 181, § 5; Act June 10, 1921, 42 Stat. 25, c. 18, § 311. In view of these express provisions, it is urged that the absence of such authority in case of the Board of Tax Appeals should indicate that it was not intended by Congress to give it the power. Our view, on the contrary, is that so necessary is the power and so usual is it that the general words by which the board is vested with the authority to prescribe the procedure in accordance with which its business shall be conducted include as part of the procedure rules of practice for the admission of attorneys. It would be a very curious situation if such power did not exist in the Board of Tax Appeals when in the Treasury Department and the office of the Commissioner of Internal Revenue there is a list of attorneys enrolled for practice in the very cases which are to be appealed to the board. . . .

It is next objected that no opportunity was given to the petitioner to be heard in reference to the charges upon which the committee acted in denying him admission to practice. We think that the petitioner having shown by his application that being a citizen of the United States and a certified public accountant under the laws of a state, he was within the class of those entitled to be admitted to practice under the board's rules, he should not have been rejected upon charges of his unfitness without giving him an opportunity by notice for hearing and answer. The rules adopted by the board provide that "the board may in its discretion deny admission, suspend or disbar any person." But this must be construed to mean the exercise of a discretion to be exercised after fair investigation with such a notice, hearing and opportunity to answer for the applicant as would constitute due process. *Garfield v. United States ex rel. Spalding*, 32 App. D. C. 153, 158; *United States ex rel. Wedderburn v. Bliss*, 12 App. D. C. 485; *Philips v. Ballinger*, 27 App. D. C. 46, 51.

The petitioner as an applicant for admission to practice was, therefore, entitled to demand from the board the right to be heard on the charges against him upon which the board has denied him admission. But he made no demand of this kind. Instead of doing so, he filed this petition in mandamus in which he asked for a writ to compel the board summarily to enroll him in the list of practitioners, and to enjoin it from interfering with his representing clients before it. He was not entitled to this on his petition. Until he had sought a hearing from the board, and been denied it, he could not appeal to the courts for any remedy and certainly not for mandamus to compel enrollment. Nor was there anything in the answer, reply or demurrer which placed him in any more favorable attitude for asking the writ.

This conclusion leads us to affirm the judgment of the Court of Appeals.

Affirmed.<sup>16</sup>

### Removal of Public Officers

While doctors and lawyers and accountants are ordinarily held to be entitled to notice and hearing, before they can be deprived of their livelihood *via* the revocation of their licenses, public officers occupy a less favored position.

The overwhelming weight of authority sustains the validity of statutory provisions permitting the removal of public officers by the executive authority of government, without notice or hearing. As to the construction of statutory provisions which are ambiguous or indefinite as to the necessity of notice and hearing, the decisions go off in all

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<sup>16</sup> Passing upon applications for licenses of various sorts has ordinarily been treated as administrative, and a notice and hearing has not ordinarily been regarded as a requirement of due process. Licensing statutes frequently omit such requirements. It has been conventional to classify licensing powers as either ministerial or discretionary. If ministerial, they have been subject to judicial control by mandamus, which proceeding offers the right to notice and hearing. If discretionary, there has been no judicial redress in the case of refusal to grant the license unless abuse of discretion could be established. Consequently, in cases involving discretion, no notice and hearing has ordinarily been available.

However, passing upon applications for licenses has been said to be judicial, or at least "*quasi-judicial*," in the following cases: *Hunstiger v. Kilian*, 130 Minn. 474, 153 N. W. 869 (1915), license to operate a rendering plant; *State v. Stevens*, 78 N. H. 268, 99 Atl. 723 (1916), license to sell lightning rods; *State on the Relation of the Attorney General and McCullough v. Scott*, 182 N. C. 865, 109 S. E. 789 (1921), license to do business as a certified public accountant. When so regarded, it is logical to regard it as accompanied by the right to notice and hearing, and in fact it has been so held in *State v. Medical Examining Board*, 32 Minn. 324, 20 N. W. 238 (1884), physician's license; *Gage v. Censors of the Medical Society*, 63 N. H. 92 (1884), physician's license.

See Byse, "Opportunity to Be Heard in License Issuance," 101 U. of Pa. L. Rev. 57 (1952).

directions. Where the power is to remove "for cause," it is usually ruled that notice must be given. *Per contra*, where the statute bestows a general power "to remove," it is ordinarily held that the officer may be removed without hearing. Cases are collected in 99 A. L. R. 336 (1935).

Why is summary action permitted, in connection with the removal of public officers? Are due process requirements attenuated merely because of the tradition in this particular field? Or are the decisions motivated by the overwhelming public interest in preventing corruption or inefficiency in public office?

#### SECTION 4. INDISPENSABLE PARTIES

**Consolidated Edison Co. v. National Labor Relations Board, Supreme Court of the United States, 1938. 305 U. S. 197, 83 L. Ed. 126, 59 S. Ct. 206.**

MR. CHIEF JUSTICE HUGHES delivered the opinion of the court.

The United Electrical and Radio Workers of America, affiliated with the Committee for Industrial Organization, filed a charge, on May 5, 1937, with the National Labor Relations Board that the Consolidated Edison Company of New York and its affiliated companies were interfering with the right of their employees to form, join or assist labor organizations of their own choosing and were contributing financial and other support, in the manner described, to the International Brotherhood of Electrical Workers, an affiliate of the American Federation of Labor. The Board issued its complaint and the employing companies, appearing specially, challenged its jurisdiction. On the denial of their request that this question be determined initially, the companies filed answers reserving their jurisdictional objections. After the taking of evidence before a trial examiner, the proceeding was transferred to the Board, which on November 10, 1937, made its findings and order.

The order directed the companies to desist from labor practices found to be unfair and in violation of § 8 (1) and (3) of the National Labor Relations Act, directed reinstatement of six discharged employees with back pay, and required the posting of notices to the effect that the companies would cease the described practices and that their employees were free to join or assist any labor organization for the purpose of collective bargaining and would not be subject to discharge or to any discrimination by reason of their choice. 4 N. L. R. B. 71.

It appeared that between May 28, 1937, and June 16, 1937, the companies had entered into agreements with the International Brotherhood of Electrical Workers and its local unions, providing for the recognition of the Brotherhood as the collective bargaining agency for those employees who were its members, and containing various stipulations as to hours, working conditions, wages, etc., and for arbitration in the

event of disputes. The Board found that these contracts were executed under such circumstances that they were invalid and required the companies to desist from giving them effect. *Id.* At the same time the Board decided that the companies had not engaged in unfair labor practices within the meaning of § 8 (2) of the Act. That clause makes it an unfair labor practice to "dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it." Accordingly the order dismissed the complaint, so far as it alleged a violation of § 8 (2), without prejudice. *Id.*

The companies petitioned the Circuit Court of Appeals to set aside the order and a petition for the same purpose was presented by the Brotherhood and its locals. These labor organizations had not been parties to the proceeding before the Board but intervened in the Court of Appeals as parties aggrieved by the invalidation of their contracts. The Board in turn asked the court to enforce the order. The United Electrical and Radio Workers of America appeared in support of the Board. The court granted the Board's petition. 95 F. (2d) 390. We issued writs of certiorari upon applications of the companies (No. 19) and of the Brotherhood and its locals (No. 25). . . .

*The Brotherhood contracts.*—The findings of the Board that the contracts with the Brotherhood and its locals were invalid, and the Board's order requiring the companies to desist from giving effect to these contracts, present questions of major importance. We approach them in the light of three cardinal considerations. One is that the Brotherhood and its locals are labor organizations independently established as affiliates of the American Federation of Labor and are not under the control of the employing companies. So far as there was any charge, under § 8 (2) of the Act, that the employing companies had dominated or interfered with the formation or administration of any labor organization or had contributed financial or other support to it, the charge was dismissed. Another consideration is that the contracts recognized the right of employees to bargain collectively; they recognize the Brotherhood as the collective bargaining agency for the employees who belong to it, and the Brotherhood agrees for itself and its members not to intimidate or coerce employees into membership in the Brotherhood and not to solicit membership on the time or property of the employers. The third consideration is that the contracts contain important provisions with regard to hours, working conditions, wages, sickness, disability, etc., and also provide against strikes or lockouts and for the adjustment and arbitration of labor disputes, thus constituting insurance against the disruption of the service of the companies to interstate or foreign commerce through an outbreak of industrial strife. It is not contended that these provisions are unreasonable or oppressive but on the contrary it was virtually conceded at the bar that they are fair to both the employers and employees. It also appears from the evidence,



which was received without objection, that the Brotherhood and its locals comprised over 30,000, or 80 per cent of the companies' employees out of 38,000 eligible for membership.

The Brotherhood and its locals contend that they were indispensable parties and that in the absence of legal notice to them or their appearance, the Board had no authority to invalidate the contracts. The Board contests this position, invoking our decision in *National Labor Relations Board v. Pennsylvania Greyhound Lines*, 303 U. S. 261. That case, however, is not apposite, as there no question of contract between employer and employee was involved. The Board had found upon evidence that the employer had created and fostered the labor organization in question and dominated its administration in violation of § 8 (2). The statement that the "Association" so formed and controlled was not entitled to notice and hearing was made in that relation. *Id.*, pp. 262, 270, 271. It has no application to independent labor unions such as those before us. We think that the Brotherhood and its locals having valuable and beneficial interests in the contracts were entitled to notice and hearing before they could be set aside. *Russell v. Clark's Executors*, 7 Cranch, 69, 96; *Mallow v. Hinde*, 12 Wheat. 193, 198; *Minnesota v. Northern Securities Co.*, 184 U. S. 199, 235; *Garzot v. de Rubio*, 209 U. S. 283, 297; *General Investment Co. v. Lake Shore & M. S. Co.*, 260 U. S. 261, 285. The rule, which was applied in the cases cited to suits in equity, is not of a technical character but rests upon the plainest principle of justice, equally applicable here. See *Mallow v. Hinde*, *supra*.

The Board urges that the National Labor Relations Act does not contain any provision requiring these unions to be made parties; that § 10 (b) authorizes the Board to serve a complaint only upon persons charged with unfair labor practices and that only employers can be so charged. In that view, the question would at once arise whether the Act could be construed as authorizing the Board to invalidate the contracts of independent labor unions not before it and also as to the validity of the Act if so construed. But the Board contends that the Brotherhood had notice, referring to the service of a copy of the complaint and notice of hearing upon a local union of the Brotherhood on May 12, 1937, and of an amended notice of hearing on May 25, 1937. Petitioners rejoin that the service was not upon a local whose rights were affected but upon one whose members were not employees of the companies' system. The Board says, however, that the Brotherhood, and the locals which were involved, had actual notice and hence were entitled to intervene, § 10 (b), and chose not to do so. But neither the original complaint—which antedated the contracts—nor the subsequent amendments contained any mention of them, and the Brotherhood and its locals were not put upon notice that the validity of the contracts was under attack. The Board contends that the complaint challenged the legality of the companies' "relations" with the Brotherhood. But

what was thus challenged cannot be regarded as going beyond the particular practices of the employers and the discharges which the complaint described. In these circumstances it cannot be said that the unions were under a duty to intervene before the Board in order to safeguard their interests.

The Board urges further that the unions have availed themselves of the opportunity to petition for review of the Board's order in the Court of Appeals, and that due process does not require an opportunity to be heard before judgment, if defenses may be presented upon appeal. *York v. Texas*, 137 U. S. 15, 20, 21; *American Surety Co. v. Baldwin*, 287 U. S. 156, 168; *Moore Ice Cream Co. v. Rose*, 289 U. S. 373, 384. But this rule assumes that the appellate review does afford opportunity to present all available defenses, including lack of proper notice, to justify the judgment or order complained of. *Id.*

Apart from this question of notice to the unions, both the companies and the unions contend that upon the case made before the Board it had no authority to invalidate the contracts. Both insist that the issue was not actually litigated, and the record supports that contention. The argument to the contrary, that the contracts were necessarily in issue because of the charge of unfair labor practices against the companies, is without substance. Not only did the complaint as amended fail to assail the contracts but it was stated by the attorney for the Board upon the hearing that the complaint was not directed against the Brotherhood; that "no issue of representation (was) involved in this proceeding"; and that the Board took the position that the Brotherhood was "a *bona fide* labor organization" whose legality was not attacked. But the Board says that on July 6th (the last of the contracts having been made on June 16th) the companies amended their answer stating that the making of the contracts had rendered the proceeding moot, and that this necessarily put the contracts in issue. We cannot so regard it. We think that the fair construction of the position thus taken on the last day of the hearings was entirely consistent with the view that the validity of the contracts had not been, and was not, in issue. And the counsel for the companies point to their brief before the Board, which they produce, as proceeding on the basis that the validity of the contracts had not been assailed.

Further, the Act gives no express authority to the Board to invalidate contracts with independent labor organizations. That authority, if it exists, must rest upon the provisions of § 10 (c). That section authorizes the Board, when it has found the employer guilty of unfair labor practices, to require him to desist from such practices "and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act." We think that this authority to order affirmative action does not go so far as to confer a punitive jurisdiction enabling the Board to inflict upon the

employer any penalty it may choose because he is engaged in unfair labor practices, even though the Board be of the opinion that the policies of the Act might be effectuated by such an order.

The power to command affirmative action is remedial, not punitive, and is to be exercised in aid of the Board's authority to restrain violations and as a means of removing or avoiding the consequences of violation where those consequences are of a kind to thwart the purposes of the Act. The continued existence of a company union established by unfair labor practices or of a union dominated by the employer is a consequence of violation of the Act whose continuance thwarts the purposes of the Act and renders ineffective any order restraining the unfair practices. Compare *National Labor Relations Board v. Pennsylvania Greyhound Lines*, *supra*. Here, there is no basis for a finding that the contracts with the Brotherhood and its locals were a consequence of the unfair labor practices found by the Board or that these contracts in themselves thwart any policy of the Act or that their cancellation would in any way make the order to cease the specified practices any more effective.

The Act contemplates the making of contracts with labor organizations. That is the manifest objective in providing for collective bargaining. Under § 7 the employees of the companies are entitled to self-organization, to join labor organizations and to bargain collectively through representatives of their own choosing. The 80 per cent of the employees who were members of the Brotherhood and its locals, had that right. They had the right to choose the Brotherhood as their representative for collective bargaining and to have contracts made as the result of that bargaining. Nothing that the employers had done deprived them of that right. Nor did the contracts make the Brotherhood and its locals exclusive representatives for collective bargaining. On this point the contracts speak for themselves. They simply constitute the Brotherhood the collective bargaining agency for those employees who are its members. The Board by its order did not direct an election to ascertain who should represent the employees for collective bargaining. § 9 (c). Upon this record there is nothing to show that the employees' selection as indicated by the Brotherhood contracts has been superseded by any other selection by a majority of employees of the companies so as to create an exclusive agency for bargaining under the statute, and in the absence of such an exclusive agency the employees represented by the Brotherhood, even if they were a minority, clearly had the right to make their own choice. Moreover, the fundamental purpose of the Act is to protect interstate and foreign commerce from interruptions and obstructions caused by industrial strife. This purpose appears to be served by these contracts in an important degree. Representing such a large percentage of the employees of the companies, and precluding strikes and providing for the arbitration of disputes, these agreements are highly protective to interstate and foreign commerce.

They contain no terms which can be said to "affect commerce" in the sense of the Act so as to justify their abrogation by the Board. The disruption of these contracts, even pending proceedings to ascertain by an election the wishes of the majority of employees, would remove that salutary protection during the intervening period.

The Board insists that the contracts are invalid because made during the pendency of the proceeding. But the effect of that pendency would appropriately extend to the practices of the employers to which the complaint was addressed. See *Jones v. Securities & Exchange Commission*, 298 U. S. 1, 15. It did not reach so far as to suspend the right of the employees to self-organization or preclude the Brotherhood as an independent organization chosen by its members from making fair contracts on their behalf.

Apart from this, the main contention of the Board is that the contracts were the fruit of the unfair labor practices of the employers; that they were "simply a device to consummate and perpetuate" the companies' illegal conduct and constituted its culmination. But, as we have said, this conclusion is entirely too broad to be sustained. If the Board intended to make that charge, it should have amended its complaint accordingly, given notice to the Brotherhood, and introduced proof to sustain the charge. Instead it is left as a matter of mere conjecture to what extent membership in the Brotherhood was induced by any illegal conduct on the part of the employers. The Brotherhood was entitled to form its locals and their organization was not assailed. The Brotherhood and its locals were entitled to solicit members and the employees were entitled to join. These rights cannot be brushed aside as immaterial for they are of the very essence of the rights which the Labor Relations Act was passed to protect and the Board could not ignore or override them in professing to effectuate the policies of the Act. To say that of the 30,000 who did join there were not those who joined voluntarily or that the Brotherhood did not have members whom it could properly represent in making these contracts would be to indulge an extravagant and unwarranted assumption. The employers' practices, which were complained of, could be stopped without imperiling the interests of those who for all that appears had exercised freely their right of choice.

We conclude that the Board was without authority to require the petitioning companies to desist from giving effect to the Brotherhood contracts, as provided in subdivision (f) of paragraph one of the Board's order.

Subdivision (g) of that paragraph, requiring the companies to cease recognizing the Brotherhood "as the exclusive representative of their employees" stands on a different footing. The contracts do not claim for the Brotherhood exclusive representation of the companies' employees but only representation of those who are its members, and the

continued operation of the contracts is necessarily subject to the provision of the law by which representatives of the employees for the purpose of collective bargaining can be ascertained in case any question of "representation" should arise. § 9. We construe subdivision (g) as having no more effect than to provide that there shall be no interference with an exclusive bargaining agency if one other than the Brotherhood should be established in accordance with the provisions of the Act. So construed, that subdivision merely applies existing law.

The provision of paragraph two of the order as to posting notices should be modified so as to exclude any requirement to post a notice that the existing Brotherhood contracts have been abrogated.

The decree of the Circuit Court of Appeals is modified so as to hold unenforceable the provision of subdivision (f) of paragraph one of the order and the application to that provision of paragraph two, subdivision (c), and as so modified the decree enforcing the order of the Board is affirmed. . . .

MR. JUSTICE REED, concurring in part, dissenting in part.

. . . The petitioners, however, aside from the merits, raise procedural objections. It is contended that before the Board could have authority to order the Edison companies to cease and desist from giving effect to their contracts with the unions, it was necessary that the unions as well as the Edison companies should have legal notice or should appear; that the unions were indispensable parties. This Court has held to the contrary in *Labor Board v. Pennsylvania Greyhound Lines*, 303 U. S. 261. This case determined that where an employer has created and fostered a labor organization of employees, thus interfering with their right to self-organization, the employer can be required without notice to the organization, to withdraw all recognition of such organization as the representative of its employees. It is said that this case "is not apposite, as there no question of contract between employer and employee was involved. The Board had found upon evidence that the employer had created and fostered the labor organization in question and dominated its administration in violation of § 8 (2)." In the instant case it was found that no such domination existed. In the Greyhound case, the Board found not only domination under § 8 (2) but also, as in this case, an unfair labor practice under § 8 (1). The company's violation of § 8 (1) was predicated on its interference with self-organization. In the Greyhound case it was said that the organization was not entitled to notice and hearing because "the order did not run against the Association." Here the unions are affected by the action on the contracts, exactly as the labor organization in the Greyhound case was affected by the order to withdraw recognition. It would seem immaterial whether those contracts were violative of one or both or all the prohibited unfair labor practices.

A further procedural objection is found in the failure of the complaint, or any of its amendments, to seek specifically a cease and desist order against continued operation under the contracts. The companies were charged with allowing organization meetings on the company time and on company property, permitting solicitation of membership during company time, and paying overtime allowances to those engaged in soliciting or coercing workers to join the contracting unions. The complaint said that similar aid was not extended to a competing union and that office assistance was given to the effort to get members for the contracting unions. These charges made it obvious that the contracts were obtained from the unions which were improperly aided by the Edison companies in violation of the prohibitions against interference with self-organization. Contracts so obtained were necessarily at issue in an examination of the acts in question.

Certainly the Edison companies and the contracting unions could have been allowed on a proper showing a further hearing on the question of the companies' continuing recognition of the contracts. By § 10 (f) the Edison companies and the unions could obtain a review of the Board's order. In that hearing either or both could show to the court, § 10 (e), that additional evidence as to the contracts was material and that it had not been presented because the aggrieved parties had not understood that the contracts were subject to a cease and desist order, or had not known of the proceeding. The court could order the Board to take the additional evidence. This simple practice was not followed. Although all parties were before the lower court on the review, the petitioners chose to rely on the impotency of the Board to enter an order affecting the contracts.

In these circumstances the provision of the order requiring the Edison companies to cease from giving effect to their contracts with the contracting unions is proper. This order prevents the Edison companies from reaping an advantage from those acts of interference found illegal by the Board.<sup>17</sup>

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<sup>17</sup> The United States Supreme Court has been obliged in several instances to pass upon the hearing rights of parties not directly in the line of fire of an administrative order. As noted in the opinion in the principal case, in the Pennsylvania Greyhound case, 303 U. S. 261, 82 L. Ed. 831, 58 S. Ct. 571 (1938), the court held that a "company-dominated" union was not entitled to a notice and hearing in a National Labor Relations Board proceeding resulting in the disestablishment of the union. But in the Consolidated Edison case the court held that "independent" unions were entitled to notice and hearing before the entry of a Labor Board order invalidating contracts with such unions. In 1940, a somewhat similar question arose in *National Licorice Co. v. National Labor Relations Board*, 309 U. S. 350, 84 L. Ed. 799, 60 S. Ct. 569. It there appeared that through the good offices of a company-dominated union, the company had entered into individual employment contracts with its employees. Such action was held by the Labor Board to be a violation of the Wagner Act in a proceeding in which the contracting employees were not parties. A cease and desist

**SECTION 5. REPRESENTATIVE PROCEEDINGS**

**Chamber of Commerce of Minneapolis v. Federal Trade Commission, Circuit Court of Appeals, Eighth Circuit, 1926. 13 F. (2d) 673.**

[Proceedings were commenced before the Federal Trade Commission against, among others, the Chamber of Commerce of Minneapolis and

order was issued. The Supreme Court on appeal held that the employees were not "necessary" parties, that the Board could proceed to a final order without making the employees parties to the proceedings, but that employees' rights under the contracts could not be *reduced* by the Board's order. Thus, the court is gradually working out the boundary lines of indispensability of parties. See 40 Columbia L. Rev. 898 (1940).

Troublesome practical difficulties arise in connection with proceedings before the Railroad Adjustment Board. The cases brought before this Board involve different considerations, from the notice and hearing viewpoint, from matters brought before the National Labor Relations Board. The N. L. R. B. usually deals with the rights of union members as a group. On the other hand, the Railroad Adjustment Board is often asked to make determinations of seniority rights in cases where the individual interests of some union members are opposed to the claims of other members. In such cases, must the individuals to be affected by the decision be given individual notice? See *Estes v. Union Terminal Co.* (5th Cir., 1937), 89 F. (2d) 768; *Nord v. Griffin* (7th Cir., 1936), 86 F. (2d) 481.

In *Missouri-Kansas-Texas R. Co. v. Brotherhood of Railway Clerks* (7th Cir., 1951), 188 F. (2d) 302, a labor organization representing railway clerks filed petitions with the National Railroad Adjustment Board seeking an order that certain jobs should be performed only by members of that Union. The petition was set down for hearing with notice to the Union of Railway Clerks and to the railroad companies. No notice was given to the Order of Railway Telegraphers, a labor organization whose members claimed that the jobs in question should be performed by them only. The Board ordered the carriers to assign the positions to the Clerks (the petitioning Union). When the railroads complied with this order, the Telegraphers brought proceedings before the Board, asserting that the jobs belonged to the Telegraphers. On this application, no notice was given to the Clerks. In the second proceeding, the Board sustained all the claims of the Telegraphers. In other words, as the court expressed it, the dispute between the rival claimants (clerks and telegraphers) was resolved in favor of both of them, with a series of awards directing the carriers to employ a member of each group for each of the jobs in dispute. The court decided that it was the duty of the Board to give notice of all hearings to both labor organizations and that, because of failure to give notice, the orders of the Board were void and their enforcement should be enjoined.

Related, although different, questions arise as to who are indispensable parties upon judicial review of agency decisions. In *Williams v. Fanning*, 332 U. S. 490, 92 L. Ed. 95, 68 S. Ct. 188 (1947), the court held that the Postmaster General was not an indispensable party in an action to review an administrative order in a case involving assertedly fraudulent use of the mails. The court held that such action could properly be brought against the local postmaster in the district of the appellant's residence. It was not necessary for appellant to institute proceedings in Washington, D. C., where the postmaster general could be served.

However, a number of cases, especially in the field of deportation, have held that review actions must be dismissed because of the failure to join agency superiors who were deemed to be indispensable parties. See, e. g., *Rodriguez v.*

the officers, board of directors and members thereof. The complaint named as respondents, and was served upon, fourteen individuals, alleging that they were officers or directors of the said Chamber and that thirteen of them were members thereof, and that "said respondent members constitute a class so numerous as to make it impractical to name them all as parties respondent herein, but those designated herein are fairly representative of the whole." The complaint further alleged that the Chamber of Commerce was a membership corporation conducting a grain market for the exclusive use of its members, that the St. Paul Grain Exchange, and the Equity Co-operative Exchange were also in the business of conducting a grain market for the benefit of their mem-

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Landon (9th Cir., 1954), 212 F. (2d) 508, where it was held that the Commissioner of Immigration was an indispensable party to an action seeking review of a deportation order.

In still another important area of administrative action the rights of collateral parties have now been extended and clarified. In earlier years, there had been uncertainty and doubt in the statutes, the regulations and the judicial decisions, concerning the rights of a broadcasting licensee to intervene or appeal under the Federal Communications Act when a competing broadcasting license is granted or an existing license is modified to work economic injury or to interfere electrically with station operation. Under what circumstances can the owners of stations so injured intervene in proceedings before the commission, or appeal to the courts? Without elaborating the ramifications of a complex phase of the law, suffice it to say that two notable Supreme Court decisions have materially broadened and clarified the rights of intervention and appeal. See Federal Communications Commission v. Sanders Bros. Radio Station, 309 U. S. 470, 84 L. Ed. 869, 60 S. Ct. 693 (1940), holding that the one who suffers *economic* injury may appeal as an "aggrieved person," provided he presents on the appeal a question of "public interest and convenience." Also see Federal Communications Commission v. National Broadcasting Co., 319 U. S. 239, 87 L. Ed. 1374, 63 S. Ct. 1035 (1943), affording both intervention and appeal to the competitor who suffers *electrical* interference. See 52 Yale L. J. 671-679 (1943); 42 Mich. L. Rev. 329 (1943).

A related question arises when two radio stations apply simultaneously for licenses that would conflict with each other. The statutes provide that a license may be *granted* without a hearing if the commission finds that "public interest, convenience, or necessity would be served." But the statutes also provide that if the Commission decides *against* the applicant "it shall notify the applicant thereof, shall fix and give notice of a time and place for hearing thereon, and shall afford such applicant an opportunity to be heard." If the license applied for by one applicant would permit operation that would result in intolerable interferences with operation under a license issued to a competing simultaneous applicant, the practical effect is that the granting of its one license compels the denial of the other. Can the first one acted upon be granted without an opportunity for the other to be heard? The Supreme Court held otherwise. *Ashbacker Radio Corp. v. Federal Communications Commission*, 326 U. S. 327, 90 L. Ed. 108, 66 S. Ct. 148 (1945).

For an excellent general treatment of the question, see Oberst, "Parties to Administrative Proceedings," 40 Mich. L. Rev. 378-405 (1942); also, Witmer, "Consumers Appeals from Public Service Commissions Rate Orders," 8 U. of Chi. L. Rev. 258 (1941).



bers, and that the respondents had entered into a conspiracy for the purpose of destroying the Exchange and the Equity and of perpetuating the monopoly of the Chamber. The Federal Trade Commission found that the Chamber and its members were guilty of the conspiracy alleged and ordered them to "cease and desist." The present action is a statutory proceeding to review the "cease and desist" order. The plaintiffs in this proceeding contend, among other things, that the commission had no jurisdiction over members of the Chamber not actually named in the complaint and upon whom it was not served. It appeared that the Chamber had in all some five hundred ninety members.]

STONE, Circuit Judge. . . . It is manifest, and petitioners concede, that the Commission intended and endeavored to include all of the members of the Chamber by designating certain of them as representatives of a class in accordance with the principle expressed in Equity Rule No. 38. That rule is as follows:

"When the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court, one or more may sue or defend for the whole."

The Federal Trade Commission is no part of the judicial system of the United States. It does not exercise judicial powers. It is an administrative body created by statute. It has only such duties and powers, as are given it, by expression or fair implication therefrom, by statute. Its granted powers of citing parties, summoning witness and holding hearings are merely means proper to enable it to determine matters of fact upon which depend the operation of the statute against unfair competition in interstate commerce.

When "cease and desist" orders come before a Court of Appeals, the proceedings in such court are of an equitable nature. However, the proceedings before the Commission are not judicial and are, therefore, not amenable to a rule designed to control only equitable proceedings before a body exercising judicial power. But the fact that Equity Rule 38 is not controlling does not determine the point raised here. While hearings before administrative bodies need not have all of the formality of judicial procedure but may be informal and, if suited to the matter involved, rather summary (*Davidson v. New Orleans*, 96 U. S. 104; *Hagar v. Reclamation Dist.*, 111 U. S. 701; *Fallbrook Irr. Dist. v. Bradley*, 164 U. S. 112), yet there are certain elements of fair play required by the Constitution which are necessary in any character of hearing affecting personal or property rights. In respect to hearings before administrative bodies (as well as judicial tribunals) those elements include (1) a reasonable time and place for hearing where interested parties may attend with reasonable effort (*Bellingham Bay & British Columbia R. Co. v. New Whatcom*, 172 U. S. 314); (2) rea-

sonable notice to interested parties (*Londoner v. Denver*, 210 U. S. 373; *English v. Arizona*, 214 U. S. 359; *Bellingham Bay & British Columbia R. Co. v. New Whatcom*, 172 U. S. 314; *Bauman v. Ross*, 167 U. S. 548; *Fallbrook Irr. Dist. v. Bradley*, 164 U. S. 112; *Paulsen v. Portland*, 149 U. S. 30; *Lent v. Tillson*, 140 U. S. 316), and (3) a reasonable opportunity for presentation of such evidence and argument as are appropriate to the proceeding (*Londoner v. Denver*, 210 U. S. 373).

As this order of the Commission is, in part, directed at the entire membership of the Chamber and as only 13 of the total membership of 590 were made respondents and served with notice of the complaint, obviously, the unserved members are not parties to the proceeding nor bound by the order unless they can be proceeded against as a class. When procedure against a class is proper in judicial proceedings, there would seem no reason why the same thing should not be done in less formal hearings, such as this, provided always that the conditions are such as to make the class representation rule applicable. Such practice has been recognized in hearings before this Commission. *Southern Hdwe. Jobbers' Ass'n v. Comm.* (C. C. A.) 290 F. 773, Fifth Circuit. These necessary conditions are (1) a common or general interest and (2) such number of individuals as to make it impracticable to bring all of them before the court. *Penny v. Central Coal & Coke Co.*, 138 F. 769, 773, 71 C. C. A. 135, 8th Cir.; *Am. Steel & Wire Co. v. Unions* (C. C.) 90 F. 598, 606; *McIntosh v. Pittsburg* (C. C.) 112 F. 705, 707; 30 Cyc. 135. There would seem to be no room for doubt that the interest of each member of the Chamber in this controversy and order is, in every substantial outline or particular, the same as that of any other member. It is equally clear that 590 members are an impracticable number to be brought into the hearing. Nor is there any question that the particular members served are not fairly representative of all the membership. Therefore, it would seem that this contention should be denied.<sup>18</sup>

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<sup>18</sup> For a brief consideration of the class suit procedure in various areas of administrative action, see a comment entitled, "Notice and Hearing in Class Suits in Administrative Proceedings," 89 U. of Pa. L. Rev. 808 (1941).

## CHAPTER IV

### SECURING INFORMATION TO BE USED AS BASIS FOR ACTION

#### SECTION 1. INTRODUCTORY NOTE

##### Practical Consequences of Discovery Power

Administrative agencies normally possess many methods of obtaining information which are not available to private litigants. The fact that agencies are often able to learn, in advance of hearing, the facts on which the respondent may rely in his defense (and as well many facts which respondent might never be forced to reveal were it not for the agencies' extraordinary powers of discovery) is one of the principal reasons why the whole tone and character of adjudicatory proceedings before administrative agencies are in many respects different than in the case of proceedings in the courts.

Two hypothetical situations (which are based in part on actual cases) serve to illustrate some of the practical problems accompanying the broad discovery powers possessed by the agencies.

#### I

The Federal Trade Commission files a complaint charging respondent company (which manufactures sugar and sells it to hundreds of wholesalers in all parts of the country) with discriminating in price, to the detriment of competition and in violation of the provisions of the Robinson Patman Act, 49 Stat. 1526, 15 USCA 13. Before the hearing opens, the Commission staff procures from respondent: (1) a complete list of its customers; (2) net prices on each sale during the last five years. The respondent may deem it burdensome to compile this information; but at least the odds so far are fairly even, because respondent may keep for its own use duplicate copies of the information furnished the Commission. But this is only the beginning. The Commission will obtain from a large number of respondent's customers statements as to the identity of each customer's competitors; for example, a wholesaler in New Orleans may say that he is in competition with another customer in Cincinnati. Respondent does not know whether these customers are in competition; nor is it permitted to examine information gathered in this respect by the agency's staff.

The Commission may then prepare a tabulation, after checking over all the invoices, showing instances wherein respondent sold at different prices to customers who will testify that they are in competition with each other. The tabulation may show 500 cases where different prices were charged to customers who will say they are thus in competition. This tabulation is not available for respondent's examination before the hearing. It will, however, be introduced as an exhibit at the hearing. The Commission will not claim that each of these 500 instances of price differential is discriminatory; it will be conceded that many of them could be justified by showing that they represent allowable quantity discounts, or that they were made to meet a special competitive price, or on some other grounds. The Commission, on introducing the exhibit, will merely take the position that it is *prima facie* evidence of discrimination, and insist that the burden is on respondent to go through all of these instances and show that each of them can be justified. After a lapse of several years, it may be impossible for respondent to assemble evidence as to the circumstances surrounding each sale. How is respondent to present its defense?

## II

Defendant company manufactures tractors and plow attachments. There is a great demand for the tractors, but very little demand for the plow attachments. Some customers (dealers in farm machinery) although eager to buy defendant's tractors, are inclined to buy cheaper plow attachments from competing manufacturers. The agency charges that defendant has improperly made tie-in-sales—that defendant refused to sell tractors to its customers unless they also ordered plow attachments from defendant. In preparing for the hearing, the agency staff obtains from defendant company copies of all its purchase orders and invoices, for a period of three years. On the basis of these records, the staff then prepares a tabulation showing: (1) the date of each order for tractors, (2) the date when shipment was made, (3) instances wherein a customer ordered plow attachments between the date when it ordered tractors and the date when the order was filled. This tabulation will not be shown to defendant in advance of the hearing. However, defendant's counsel (knowing the agency will say this tabulation is *prima facie* evidence that discreet pressure may have been applied to induce the customer to order plow attachments, in order to obtain prompt shipment of the tractors) can prepare a similar table for defendant's use. The agency staff also obtains from defendant company copies of all letters from customers, during a like three-year period. Included in this correspondence are six letters from customers complaining that defendant's salesmen have hinted that the customers should order plow attachments if they expect to receive prompt shipment of tractors. Such letters, to be sure, are not necessarily truthful; a customer might write such a complaint without foundation, hoping it would induce defendant com-

pany to ship the tractors promptly, without an order for plow attachments, in order to demonstrate that it is not following a tie-in sales policy.

When the case comes on for hearing, the agency offers in evidence a tabulation showing that in 157 instances a customer ordered tractors, and later (but before shipment of the tractors) sent in an order for plow attachments. It also offers the testimony of two customers—not necessarily included in the 157 instances referred to in the tabulation—that a salesman of defendant (who unfortunately is no longer available) hinted that if they wanted early delivery on their tractor orders, it would be a good idea for them to also order some plow attachments. There is also called as a witness a former salesman of defendant—who had been discharged for incompetency—and he testifies that defendant's salesman had told him to make "every effort" to persuade customers to order plow attachments. The agency then takes the position that it has established a *prima facie* case, and that it is up to the defendant company to prove that in none of the 157 cases was the customer required to order plow attachments in order to get the tractors. Defendant can show many instances where tractors were shipped without matching orders for plow attachments; but it cannot produce any direct evidence as to the 157 instances on which the agency relies.

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What are the practical results of these broad discovery powers?

Suppose, in either of the above cases, respondent's counsel was advised that the agency would entertain a proposed stipulation to settle the case on the basis of the entry of a consent order to cease and desist. The consent order would be less harsh in its terms than the order that would be entered if the case were decided against respondent after a hearing; however, agreement to such a stipulation would be construed in the trade as carrying some implied admission of guilt. If you represented respondent, would you advise it to accept a consent order?

To whom would the hearing examiner look, for information on which to make his findings? Would there be a tendency on the part of the examiner to rely more heavily on the inferences suggested by the agency's *prima facie* facts, than on general assertions by respondent's officers that it had not violated the laws?

Should the courts take into consideration these practical results of the agencies' discovery powers, in deciding how broad a scope should be allowed the demands of the agencies for information?

**Comments of Hoover Commission (1955)**  
**(Report on Legal Services and Procedure, p. 60)**

I. *Investigations and Subpenas.* Investigatory authority, often aided by the subpoena power for the attendance of witnesses and the

production of evidence, constitutes an essential adjunct of administrative action. The exercise of investigatory and subpoena powers must, of course, be in strict accordance with the jurisdiction that the Congress has conferred upon the agency concerned, and only when they are expressly conferred by statute should such powers be exercised. The scope of these powers when granted should not be unlimited, however, and the courts should be authorized to restrain any investigations which are in the nature of "fishing expeditions" or which impinge on the rights of the citizen.

Presiding officers should be authorized to issue subpoenas for the appearance of witnesses or the production of evidence in any proceeding required under the Constitution or by statute to be determined after opportunity for hearing. Subpoenas should be issued impartially and without discrimination as between parties, whether public or private, upon a showing of general relevance and reasonable scope of the evidence sought.

Any person subject to a subpoena should be able to obtain from a court of competent jurisdiction a ruling as to the lawfulness thereof, and, where proper, relief therefrom. Nevertheless, we do not believe this should be used for frivolous or delaying reasons. Penalties should be imposed in such instances.

#### RECOMMENDATION NO. 36.

*The investigatory and subpoena powers of administrative agencies should be exercised in accordance with the jurisdiction of the agency concerned; the courts should consider the jurisdictional question in any proceeding for enforcement and enforce the subpoena unless clearly erroneous; and subpoenas should be issued impartially. Costs and reasonable attorneys' fees or equivalent sum in lieu thereof should be imposed in favor of any prejudiced party, including the United States, in cases where actions contesting the jurisdiction of any agency are frivolous or brought for the purpose of delay.*

### SECTION 2. SUBPOENAS AND SUBPOENAS DUCES TECUM

#### Statutory Provisions

Statutes setting up administrative tribunals ordinarily contain provisions authorizing the tribunals to issue subpoenas and subpoenas *duces tecum*. They also contain a variety of provisions for enforcement of subpoenas, for taking depositions, for administering oaths, etc. The provisions of the Interstate Commerce Act on this matter are illustrative. Section 12 of that Act (49 USCA 12) provides as follows:

Section 12. (1) The Commission hereby created shall have authority to inquire into the management of the business of all common carriers subject to the provisions of this act, and shall keep itself informed as to the manner and method in which the same is conducted, and shall

have the right to obtain from such common carriers full and complete information necessary to enable the Commission to perform the duties and carry out the objects for which it was created; and the Commission is authorized and required to execute and enforce the provisions of this Act; and, upon the request of the Commission, it shall be the duty of any district attorney of the United States to whom the Commission may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States all necessary proceedings for the enforcement of the provisions of this Act and for the punishment of all violations thereof, and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States; and for the purposes of this Act the Commission shall have power to require, by subpoena, the attendance and testimony of witnesses and the production of all books, papers, tariffs, contracts, agreements, and documents relating to any matter under investigation.

(2) Such attendance of witnesses, and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing. And in case of disobedience to a subpoena the Commission, or any party to a proceeding before the Commission, may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of books, papers, and documents under the provisions of this section.

(3) And any of the district courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any common carrier subject to the provisions of this Act, or other person, issue an order requiring such common carrier or other person to appear before said Commission (and produce books and papers if so ordered) and give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof.

(4) The testimony of any witness may be taken, at the instance of a party, in any proceeding or investigation pending before the Commission, by deposition, at any time after a cause or proceeding is at issue on petition and answer. The Commission may also order testimony to be taken by deposition in any proceeding or investigation pending before it, at any stage of such proceeding or investigation. Such depositions may be taken before any judge of any court of the United States, or any United States commissioner, or any clerk of a district court, or any chancellor, justice, or judge of a supreme or superior court, mayor or chief magistrate of a city, judge of a county court, or court of common pleas of any of the United States, or any notary public, not being of counsel or attorney to either of the parties, nor interested in the event of the proceeding or investigation. Reasonable notice must first be given in writing by the party or his attorney proposing to take such deposition to the opposite party or his attorney of record, as either may be nearest, which notice shall state the name of the witness and the time and place of the taking of his deposition. Any person may be compelled to appear and depose, and to produce documentary evidence, in the same manner as witnesses may be compelled to appear and testify and produce documentary evidence before the Commission as hereinbefore provided.

It is also usual to provide for immunity from prosecution in order not to run into conflict with constitutional provisions concerning self-incrimination. The provisions supplementary to the Interstate Commerce Act on this matter are typical. They are as follows:

27 Stat. 443 (49 USCA 46). Self-incriminating testimony; perjury; refusal to testify. No person shall be excused from attending and testifying or from producing books, papers, tariffs, contracts, agreements, and documents before the Interstate Commerce Commission, or in obedience to the subpoena of the Commission, whether such subpoena be signed or issued by one or more commissioners, or in any cause or proceeding, criminal or otherwise, based upon or growing out of any alleged violation of chapter 1 of this title on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him, may tend to criminate him or subject him to a penalty or forfeiture. But no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify, or produce evidence, documentary or otherwise, before said Commission, or in obedience to its subpoena, or the subpoena of either of them, or in any such case or proceeding: *Provided*, That no person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying. Any person who shall neglect or refuse to attend and testify, or to answer any lawful inquiry, or to produce books, papers, tariffs, contracts, agreements and documents, if in his power to do so, in obedience to the subpoena or lawful requirement of the Commission shall be guilty of an offense and upon conviction thereof by a court of competent jurisdiction shall be punished by fine not less than \$100 nor more than \$5,000, or by imprisonment for not more than one year or by both such fine and imprisonment.

32 Stat. 904, § 1 (49 USCA 47). Immunity of witness from prosecution; perjury. No person shall be prosecuted or be subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence, documentary or otherwise, in any proceeding, suit, or prosecution under chapter 1 of this title or any law amendatory thereof or supplemental thereto: *Provided*, That no person so testifying shall be exempt from prosecution or punishment for perjury committed in so testifying.

34 Stat. 798 (49 USCA 48). Immunity extended to natural persons only. Under the immunity provisions in sections 43, 46, and 47 of this title immunity shall extend only to a natural person who, in obedience to a subpoena, gives testimony under oath or produces evidence, documentary or otherwise, under oath.

**Cudahy Packing Co. of Louisiana, Ltd. v. Holland, Administrator of Wage and Hour Division, U. S. Department of Labor, Supreme Court of the United States, 1942. 315 U. S. 357, 86 L. Ed. 895, 62 S. Ct. 651.**

MR. CHIEF JUSTICE STONE delivered the opinion of the court:

Of the several questions raised by this record only one requires our attention: Whether under the Fair Labor Standards Act, 52 Stat. 1060, 29 USCA § 201 et seq., the Administrator of the Wage and Hour Divi-



sion of the Department of Labor has authority to delegate his statutory power to sign and issue a subpoena duces tecum.

By § 11 of the Act the Administrator and his designated representatives are authorized to conduct investigations which he may deem necessary "to determine whether any person has violated any provision of this Act, or which may aid in the enforcement of the provisions of this Act." The Act does not define the Administrator's power to issue subpoenas or specifically authorize him to delegate it to others. But, for the purposes of any hearing or investigation, § 9 of the Act makes applicable to the powers and duties of the Administrator, the Chief of the Children's Bureau, and the industry committees, the subpoena provisions of §§ 9 and 10 of the Federal Trade Commission Act. 15 USCA §§ 49 and 50. The Administrator is thus given all the powers with respect to subpoenas which are conferred upon the Federal Trade Commission, and no more. Under § 9 of the Trade Commission Act the Commission may require the attendance and testimony of witnesses, and production of documents by subpoena; and any members of the Commission may sign the subpoenas. The Commission may apply to any district court within whose jurisdiction an investigation is carried on for an order compelling compliance with a subpoena.

The Administrator argues that he is given authority to delegate to regional directors the signing and issuance of subpoenas by § 4 (c) of the present Act, and that, in any case, this authority is to be implied from the structure of the Act and the nature of the duties which are imposed upon him. Section 4 (c) provides: "The principal office of the Administrator shall be in the District of Columbia, but he or his duly authorized representative may exercise any or all of his powers in any place." On its face this seems no more than a definition of the geographical or territorial jurisdiction of the Administrator and his representatives. The designation of the District of Columbia as the location of the Administrator's principal office is qualified by the provision that either the Administrator or his representative may exercise "his powers" in "any place." Only if such is its meaning does § 4 (c) comport with the structure and related provisions of the Act.

If, as the Administrator contends, the section is to be read as authorizing delegation of the subpoena power, that authority is without limitation. He may confer the power on any employee appointed under § 4 (b), whom "he deems necessary to carry out his functions and duties," or even on those who render the voluntary and uncompensated service which he may accept under that section. Moreover, if so read, § 4 (c) likewise gives the Administrator unrestricted authority to delegate every other power which he possesses, and would render meaningless and unnecessary the provisions of § 11 authorizing the Administrator to delegate his power of investigation to designated representatives.

If such is the meaning of the Act, he could delegate at will his duty to report periodically to Congress (§ 4 (d)), to appoint industry committees and their chairmen, to fix their compensation and prescribe their procedure (§ 5), to approve or disapprove their reports by orders whose findings of fact, if supported by substantial evidence, are conclusive (§ 10), to define certain terms used in the Act (§ 13), to provide by regulations or orders for the employment of learners and handicapped workers (§ 14), as well as other duties. A construction of the Act which would thus permit the Administrator to delegate all his duties, including those involving administrative judgment and discretion which the Act has in terms given only to him, can hardly be accepted unless plainly required by its words.

The Administrator seeks to meet this difficulty by construing § 4 (c) as authorizing the delegation of some but not all of his administrative functions. But we cannot read "any or all" as meaning "some." And in any case if only some functions can be delegated, we are afforded no legislative guide for determining which may and which may not be delegated. We think that the words of the section, read in their statutory setting, make it reasonably plain that its only function is to provide that the Administrator and his representatives may exercise either within or without the District of Columbia such powers as each possesses. This construction is fully supported by the legislative history of § 4 (c).

The Administrator also urges that his authority to delegate the subpoena power is to be inferred from the nature of his duties and from the fact that under § 11 he may through designated representatives gather data and make investigations authorized by the Act. He points to the wide range of duties imposed upon him, the vast extent of his territorial jurisdiction, and the large number of investigations required for the enforcement of the Act. From this he argues that Congress must have intended that he should be permitted to delegate his authority to sign and issue subpoenas. But this argument loses force when examined in the light of related provisions of the Act and of the actual course of Congressional legislation in this field.

Unlimited authority of an administrative officer to delegate the exercise of the subpoena power is not lightly to be inferred. It is a power capable of oppressive use, especially when it may be indiscriminately delegated and the subpoena is not returnable before a judicial officer. Under the present Act, the subpoena may, as in this case, be used to compel production at a distant place of practically all of the books and records of a manufacturing business, covering considerable periods of time. True, there can be no penalty incurred for contempt before there is a judicial order of enforcement. But the subpoena is in form an official command, and even though improvidently issued it has some coercive tendency, either because of ignorance of their rights on the part of those whom it purports to command or their natural respect for what

appears to be an official command, or because of their reluctance to test the subpoena's validity by litigation. All these are cogent reasons for inferring an intention of Congress not to give unrestricted authority to delegate the subpoena power which it has in terms granted only to the responsible head of the agency.

The subpoena power differs materially in these respects from the power to gather data and make investigations which is expressly made delegable by § 11. Without the subpoena that power is, in effect, a power of inspection at the employer's place of business to be exercised only on his consent. It is much less burdensome than the requirement of his selection of great numbers of books and papers and their production at other places. Because of these differences, it seems to us fairly inferable that the grant of authority to delegate the power of inspection, and the omission of authority to delegate the subpoena power, show a legislative intention to withhold the latter. Moreover, if a subpoena power in the regional directors were to be implied from their delegated authority to investigate, we should have to say that Congress had no occasion expressly to grant the subpoena power to the Administrator, who also has the power to investigate, and that the grant to him was superfluous and without meaning or purpose.

The entire history of the legislation controlling the use of subpoenas by administrative officers indicates a Congressional purpose not to authorize by implication the delegation of the subpoena power. The Interstate Commerce Act, the National Labor Relations Act, and the Federal Trade Commission Act, whose subpoena provisions were adopted by the present Act and by the Packers and Stockyards Act, all fail to grant authority to delegate the issuance of subpoenas. It appears that none of the agencies administering these acts has construed the authority of its head to include the power to delegate the signing and issuance of subpoenas. On the other hand, Congress, in numerous cases, has specifically authorized delegation of the subpoena power. In others it has granted the power to particularly designated subordinate officers or agents, thus negating any implied power in the head to delegate generally to subordinates. The suggestion that the Administrator is given authority to delegate the subpoena power because the applicable Trade Commission Act authorizes individual members of the Commission as well as the Commission itself to sign subpoenas overlooks the fact that the Administrator alone occupies a position under this Act corresponding to that of the Commissioners under their Act. The structure of the Trade Commission Act lends no support to the view that the Administrator has an implied power to delegate the signing and issuance of subpoenas to persons undesignated by the statute, a power not granted to or exercised by the Commission or its members.

All this is persuasive of a Congressional purpose that the subpoena power shall be delegable only when an authority to delegate is expressly

granted. That purpose has been emphasized here not only by the authority expressly given to delegate the power to conduct investigations, and in the adoption by reference of the subpoena provisions of the Federal Trade Commission Act, which contain no authority to delegate, but by the legislative history of the present Act, which shows that the authority to delegate the subpoena power was eliminated by the Conference Committee from the bills which each House had adopted. Such authority expressly granted in the bill which passed the Senate, was rejected by the Conference Committee. It also discarded the provisions of the House bill which committed the administration of the Act to the Secretary of Labor, who has a general power of delegation under Rev. Stat. § 161, 5 USCA § 22, and placed in his stead the Administrator, who was given only the subpoena powers of the Federal Trade Commission incorporated in the House bill.

We cannot assume that Congress was of the opinion that the present agency, when appropriately organized for the purpose, would be any the less able to function without the power in the Administrator to delegate the signing and issuance of subpoenas than the Federal Trade Commission, the Interstate Commerce Commission, and other agencies which have not been given and do not assert the power. Nor can we assume, as the Government argues, that Congress is wholly without design in withholding the power in this case and granting it in others, or even if it had been, that it is any part of the judicial function to restore to the Act what Congress has taken out of it. Even though Congress has underestimated the burden which it has placed upon the Administrator, which is by no means clear, we think that the legislative record establishes that Congress has withheld from him authority to delegate the exercise of the subpoena power, and that this precludes our restoring it by construction.

### Enforcement of Subpoenas

**Langenberg v. Decker, Supreme Court of Indiana, 1892. 131 Ind. 471, 31 N. E. 190.**

COFFEY, J. The General Assembly of the state passed an act, which was approved and went into force on the 6th day of March, 1891, entitled "An act concerning taxation, repealing all laws in conflict herewith, and declaring an emergency." The act creates a state board of tax commissioners, composed of five persons, viz., the secretary of state, the auditor of state, and the governor of the state, who are styled *ex officio* members, and two persons of opposite political faith, appointed by the governor of the state. At the time the matters occurred out of which this suit arose the board was composed of the secretary of state, the auditor of state, the governor of the state, Josiah N. Gwin, and Ivan N. Walker. By the provisions of the act the governor of the state is the chairman of the state board of tax commissioners. Section

129 of the act provides that this board shall annually convene in the office of the auditor of state on the first Monday of August each year for the purpose of assessing railroad property, and equalizing the assessment of real estate; that it shall not be bound by any reports or estimates of value of railroad property, real estate, or other property, as returned to the county auditors or to the auditor of state, but shall appraise and assess all property at its true cash value, as defined by the act, according to its best knowledge and judgment, and so equalize the assessment of property throughout the state. It also contains this provision: "They shall have the power to send for persons, books, and papers, to examine records, hear and question witnesses, to punish for contempt any one who refuses to appear and answer questions by fine not exceeding one thousand dollars, and by imprisonment in the county jail of any county not exceeding thirty days, or both. Appeals shall lie to the criminal court of Marion county from all orders of the board inflicting such punishment, which appeals shall be governed by the laws providing for appeals in criminal cases from justices of the peace, so far as applicable. The sheriffs of the several counties of the state shall serve all process and execute all orders of the board."

Claiming to act under the power and authority conferred upon it by the provisions of the statute, the state board of tax commissioners, on its own motion, caused a subpoena *duces tecum* to be issued to all the banks in the state, requiring the president, cashier, and bookkeeper, or either of them, of the bank named in the subpoena, to appear before the board at the office of the state board of tax commissioners in the state house in the city of Indianapolis, on a day named in the subpoena, and to bring and have with them then and there such books, papers, and accounts of such banking institution as should fully disclose and show the names of all persons having money, bonds, stocks, notes, or other property of value on deposit and in the custody of such bank on the 1st day of April, 1891, and the respective amounts of such deposits or other property in the custody of the bank and to answer all questions which might be asked in relation thereto or with reference to the property owned by the bank itself. The subpoena was signed by Joseph T. Fanning, as secretary of the board. At the bottom of the subpoena, and following the signature of the secretary, was the following: "For the purposes of the state board of tax commissioners as set forth in this subpoena, it will answer if the president, cashier, or bookkeeper of the above-mentioned bank make out a sworn statement of the balances to the credit of its individual depositors on April 1, 1891, giving name in full of each depositor, amount of his credit balance, and forward said sworn statement to the state board of tax commissioners without delay."

One of the subpoenas was served upon the appellee at the city of Evansville, where he resides, and where he is vice president of a state

bank known as the "German Bank of Evansville." In answer to the subpoena he appeared before the state board of tax commissioners on the 25th day of August, 1891, when there were present of the members of the board the following persons, and no others, viz., Claude Matthews, secretary of state, acting as president of the board, J. O. Henderson, auditor of state, and Ivan N. Walker. Upon his appearance he was duly sworn, when the following proceedings were had, viz.: "Question. State your name and place of residence. Answer. Philip C. Decker. I reside in the city of Evansville. Q. In what business are you engaged? A. That of banking. Q. With what institution are you engaged and in what capacity? A. I am vice president of the German Bank of Evansville, Indiana. The president lately died, and I am acting as president. Our bank was organized under the laws of Indiana. Q. State the aggregate amount of the individual deposits held by the German Bank, of which you are vice president, on the 1st day of April, 1891. A. About \$300,000. Q. Give the amount of money held on deposit by said bank on the 1st day of April, 1891, belonging to some one depositor. The Witness: Before answering the question, I respectfully ask the board whether there is any appeal, complaint, suit, or proceeding of any kind pending before this board or elsewhere to assess any depositor, or to revise his tax list in any manner. By the Board: No. We are exercising the power of discovery. The Witness: I decline to answer, under the advice of counsel, either as to the name of any depositor or the amount of his deposit. Q. Give me the amount of personal property, other than money, held by your bank as custodian or agent, on the 1st day of April, 1891, such as notes, stocks, bonds, or other property of value belonging to any one depositor. A. I respectfully ask the board to state, before an answer to the question just put, whether there is any appeal, complaint, cause, or proceeding of any kind pending before this board or elsewhere to assess the property of said bank, or any partner therein. Answer by the Board: No. The Witness: I decline to do so, under advice of counsel. Q. For the purpose of ascertaining what, if any, money on deposit in your institution, belonging to persons, firms, companies, or corporations, has been omitted, purposely or otherwise, from the tax duplicate of Vanderburgh county, you will please give this board a list of the names of your depositors on the first day of April, 1891. A. I most respectfully decline to give such list, having just been informed by the board that no appeal, complaint, suit, or proceeding is here pending before this board or elsewhere to assess or revise the tax list of any depositor or partner or officer of the bank. Q. For the purpose above indicated, give a list of depositors on the 1st day of April, 1891, with the several amounts of money to their credit on that day. A. I decline to give either the names of my depositors or the several amounts standing to their credit, respectively, on the 1st day of April, 1891, either for taxes, or for any other purpose,

because I am now informed by the board that there is no appeal, complaint, suit, or proceeding pending here or elsewhere to assess or revise the tax list of any depositor. Q. Likewise give us the names of all persons who have property other than money, stocks, bonds, jewelry, or other property of value by said German Bank held as custodian on the 1st day of April, 1891, and the several amounts, with a description and value of such property. A. I decline to answer your questions for the reasons given above. Q. By an examination of the books and papers of said bank, would you, as its vice president, be able to furnish to this board the information asked for in the foregoing question? A. I would not. Q. You are now commanded to produce such books and papers of the German Bank for the inspection of this board as will fully afford the information herein sought to be obtained, and which will discover the names of the depositors of said German Bank on the 1st day of April, 1891, and the several amounts to their credit; also such books as will show the names and description of the property of value held by said bank as custodian and agent on said day. A. As vice president of said bank, I now decline to produce any of its books or papers for the inspection of this board for any purpose."

Thereupon the state board of tax commissioners, because of the refusal of the appellee to appear and answer the questions above set forth, and to give the information thereby sought to be elicited, assessed against him a fine of \$500, and that he stand committed until the fine be paid or replevied, and entered the following judgment: "Therefore it is considered and ordered by the state board of tax commissioners that Philip C. Decker, on account of his refusal to appear and answer questions, and his disobedience to the order of this board, be, and hereby is, fined in the sum of five hundred dollars (\$500); and it is further considered by the board that said Philip C. Decker do stand committed to the jail of Marion county, Indiana, until said fine be paid or replevied." Upon entering the foregoing judgment, the secretary of the board delivered to the appellant, as the sheriff of Marion county, a commitment reciting the fact that the appellee had been fined the sum of \$500 for contempt, and ordering that he be committed to the jail of Marion county until discharged by due process of law. Upon this commitment the appellee was arrested. He thereupon filed his petition in the Marion superior court, praying for a writ of habeas corpus. To the writ issued upon this petition the appellant made his return, stating, among other things, substantially the proceedings above set forth. To this return the appellee filed exceptions, which were sustained by the court, and an order was entered discharging the appellee from custody.

The assignment of error calls in question the propriety of the ruling of the Marion superior court in sustaining the exceptions to the return made by the appellant to the writ of habeas corpus. It is contended by the appellee: First. That the power to punish for contempt is a judi-

cial function, which can only be exercised by a court, and, if it be claimed that the act in question makes the state board of tax commissioners a court, then so much of the act as seeks to do so is void, because it is not embraced in the title of the act, and because three of the persons constituting the board are forbidden by the Constitution of the state from exercising judicial functions. Second. That, if the board has power to punish for contempt, it can only do so for the refusal of a witness to appear and answer questions pertinent and material to some issue in a suit, action, or proceeding then pending. Third. That the proceedings of the board in this matter are in violation of the provisions of the Constitution of the United States, which provides that "the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated, and no warrant shall issue but upon reasonable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or thing to be seized." Fourth. That the state board of tax commissioners has no original jurisdiction, except in the matter of the assessment of railway corporations, and equalizing the assessments of real estate.

These several propositions have been ably and exhaustively argued on both sides, not only in the briefs on file, but also orally in open court; but it seems to us that, if the first proposition presented by the appellee, namely, that so much of the statute in question as attempts to confer on the state board of tax commissioners the power to fine and imprison for contempt of its authority is void by reason of being in conflict with the state constitution, can be sustained, the other questions presented do not necessarily or properly arise. If this position cannot be maintained, then some or all of the other propositions do arise, and must be decided by this court. But the first inquiry in a case like this leads naturally to an investigation of the authority under which the complaining party has been deprived of his liberty. The solution of the question presented renders it necessary that we shall inquire—First, as to what department of the state government the state board of tax commissioners belongs; and, second, into the nature of the power to fine and commit for contempt.

Article 3, § 1, of our State Constitution, is as follows: "The powers of the government are divided into three separate departments,—the legislative, the executive, including the administrative, and the judicial; and no person charged with official duties under one of these departments shall exercise any of the functions of another, except as in the Constitution expressly provided." The division of power made by our Constitution exists in the Federal Constitution, and in most, if not all, of the State Constitutions. The powers of these departments are not merely equal; they are exclusive in respect to the duties assigned to each, and they are absolutely independent of each other. The en-



encroachment of one of these departments upon the other is watched with jealous care, and is generally promptly resisted, for the observance of this division is essential to the maintenance of a republican form of government. *Wright v. Defrees*, 8 Ind. 298; *Railroad Co. v. Geiger*, 34 Ind. 185; *State v. Denny*, 118 Ind. 382; *State v. Noble*, 118 Ind. 350; *Hovey v. State*, 127 Ind. 588. It is the duty of the legislative department of the state to make the laws; it is the duty of the judicial department to construe and apply them; and it is the duty of the executive department to see that such laws are faithfully executed. No provision of our Constitution was more carefully considered and fully discussed in the constitutional convention than the one now under consideration. As to the legislative department, it is believed that Mr. Biddle expressed what was the understanding of the convention when he said: "The General Assembly has no other duty nor power than to make laws. After a law has been enacted, this department has no further power over the subject. It can neither adjudge the law, nor execute it, but must leave it upon the statute books; and, for any function still remaining in the legislative power, there it would forever remain. All the power of this department here ends." 2 Const. Debates, 1324. It cannot with propriety be contended that the state board of tax commissioners belongs to the legislative department of the state, for it has no power to enact laws. The General Assembly cannot delegate its law-making power to any other person or body. It cannot be successfully maintained that the legislature could confer on the governor of the state and the principal administrative officers of the state duties pertaining to the judicial department. Indeed, the learned attorney general admits in argument that the state board of tax commissioners is not a court, and he does not contend that it can perform any function which is of a purely judicial character. As the state board of tax commissioners is neither a legislative body nor a court, it must belong to the executive or administrative department of the state. That it does belong to that department we think is too plain for argument. It is charged with the duty of executing certain provisions of the revenue laws of the state, and when it has performed that duty its functions are at an end. But because it is a body belonging to the executive or administrative department of the government it by no means follows that it may not perform functions which are, in their nature, judicial. Hearing and determining appeals from the county board of review, hearing witnesses, and equalizing the appraisal of real estate and assessing the railroad property named in the act, is the performance of a duty judicial in its nature. . . . In the case of *Kuntz v. Sumption*, 117 Ind. 1, 19 N. E. 474, in speaking of the tribunal, this court said: "We agree with the appellee's counsel that the board of equalization is not a judicial tribunal in the strict sense of the term; but, while this is true, it is also true that it possesses functions of a judicial nature."

It is often a matter of much difficulty to determine whether the functions exercised by a tribunal of this character are such as pertain exclusively to the courts, or whether they are such as it may lawfully exercise. Mr. Mechem on Public Office and Officers, section 637, says: "*Quasi-judicial* functions . . . are those which lie midway between the judicial and ministerial ones. The line separating them from such as are thus on their two sides are necessarily indistinct; but, in general terms, when the law in words or by implication commits to any officer the duty of looking into facts, and acting upon them, not in a way which it specifically directs but after a discretion in its nature judicial, the function is termed *quasi-judicial*." That it was in the power of the General Assembly to confer on the state board of tax commissioners the power to hear and determine appeals from the county boards of review, to equalize the assessments of real estate, and to assess the railroad property named in the act, is not doubted; and the question as to whether the legislature could confer upon it the power to fine and imprison the citizens of the state for contempt of its authority depends upon whether such action is purely judicial or only *quasi-judicial*. A proceeding against a person as for a contempt is ordinarily in the nature of a criminal proceeding, and statutes authorizing punishment for contempt of the authority of a tribunal are criminal statutes, and are to be strictly construed. *Maxwell v. Rives*, 11 Nev. 213; *Holman v. State*, 105 Ind. 513. In the case of *Ex parte Doll*, 7 Phila. 595, in discharging the prisoner, who had been committed by a commissioner appointed by the United States Circuit Court as for a contempt for refusing to appear and testify and produce certain books, the court said: "I very much doubt the power of congress to invest a commissioner with authority in a proceeding originally brought before him to summarily commit a citizen for alleged contempt. This was an exercise of the judicial power of the United States, which, under the Constitution, could not be intrusted to an officer appointed and holding his office in the manner in which they were appointed and held their offices."

[The court thereupon analyzed several other cases dealing with the question.] . . . These cases lead to the inevitable conclusion that the power to punish for contempt belongs exclusively to the courts, except in cases where the Constitution of a state expressly confers such power upon some other body or tribunal. Our State Constitution confers such power upon the General Assembly, but upon no other body. The doctrine that such power rests with the courts alone is based upon the fact that a party cannot be deprived of his liberty without a trial. To adjudge a person guilty of contempt for a refusal to answer questions, the tribunal must determine whether such questions are material, and whether it is a question which the witness is bound to answer; otherwise it cannot be determined that the witness is in contempt of its authority in refusing to answer. So far as we are informed, the trial of a citizen,

involving the question of his liberty, by any civil tribunal other than a court, has never been sustained, unless the power to do so was conferred by some constitutional provision. For the reasons above given, our conclusion is that so much of the act under consideration as attempts to confer on the state board of tax commissioners power to fine and imprison for contempt is in violation of section 1, article 3, of our State Constitution and is void. It follows that such board has no authority to fine the appellee, and commit him to the jail of Marion county, and that the Marion Superior Court did not err in ordering his release. . . .

Judgment affirmed.<sup>1</sup>

<sup>1</sup> As to the correctness of the court's statement that the "cases lead to the inevitable conclusion that the power to punish for contempt belongs exclusively to the courts," see *McGrain v. Daugherty*, 273 U. S. 135, 71 L. Ed. 580, 47 S. Ct. 319 (1927), in which the power of Congress to issue compulsory process and punish recusancy was upheld. For a limitation on congressional power in this regard, see *Kilbourn v. Thompson*, 103 U. S. 168, 26 L. Ed. 377 (1880); and for a thorough examination of the historical aspects of the legislative contempt power, one should read Landis, "Congressional Power of Investigation," 40 Harv. L. Rev. 153 (1926). Also see Potts, "Power of Legislative Bodies to Punish for Contempt," 74 U. of Pa. L. Rev. 780 (1926).

Attempts are rather infrequently made to give legislative committees contempt powers. The validity of such attempts is doubtful. See *Herwitz and Mulligan*, "The Legislative Investigating Committee," 33 Columbia L. Rev. 3, 25 (1933). Consequently, it is the usual practice to bring the recalcitrant witness before the legislature and punish him as in contempt thereof. This was the practice followed in *McGrain v. Daugherty*, ante.

As to conferring the power to punish for contempt upon notaries, see 35 Columbia L. Rev. 582-584 (1935), in which cases both affirming and denying the right to confer such power are cited. Where the right is affirmed, it is usually based upon the fact that the notary is an arm of the court. *Noell v. Bender*, 317 Mo. 392, 295 S. W. 532 (1927).

Although the commonly accepted view as to the constitutionality of statutes conferring the power to punish for contempt on administrative tribunals is in accord with *Langenberg v. Decker*, a few courts have held that the power can be conferred upon such bodies without running afoul of constitutional limitations. In *re Sanford*, 236 Mo. 665, 139 S. W. 376 (1911), involving a county board of equalization; *Plunkett v. Hamilton*, 136 Ga. 72, 70 S. E. 781 (1911), involving a board of police commissioners; In *re Hayes*, 200 N. C. 133, 156 S. E. 791 (1931), involving a state industrial accident commission. See *Sherwood*, "The Enforcement of Administrative Subpoenas," 44 Columbia L. Rev. 531 (1944).

In several states specific constitutional amendments have been adopted conferring contempt powers on certain administrative tribunals. Do the hazards of conferring such powers exceed the advantages gained thereby? See "The Power of Administrative Agencies to Commit for Contempt," 35 Columbia L. Rev. 578 (1935).

As to the punishment of consummated contempt by legislative bodies, see *Journey v. MacCracken*, 294 U. S. 125, 79 L. Ed. 802, 55 S. Ct. 375 (1935), holding that completely executed contempt in the form of destruction of papers sought by the legislative body could be punished by that body. Although punish-

**Interstate Commerce Commission v. Brimson, Supreme Court of the United States, 1894. 154 U. S. 447, 38 L. Ed. 1047, 14 S. Ct. 1125.**

[The Interstate Commerce Commission on its own motion proceeded to investigate the activities of a group of switching companies, it having been reported to the Commission that these companies were in reality owned by the Illinois Steel Company, and that they were being used by the steel company to get unreasonable preferences on interstate commerce from connecting interstate rail carriers. Brimson and Keefe, officers of the switching companies, and Sterling, vice president of the steel company, were subpoenaed and questioned as to whether or not the steel company was in fact the owner of the switching companies. They refused to answer the questions put to them. The Commission thereupon presented to the United States Circuit Court a petition alleging the facts and praying that the persons named be ordered to answer the interrogatories. The circuit court dismissed the petition. The Commission appealed.]

MR. JUSTICE HARLAN. This appeal brings up for review a judgment rendered December 7, 1892, dismissing a petition filed in the Circuit Court of the United States on the 15th day of July, 1892, by the Interstate Commerce Commission, under the act of Congress entitled "An act to regulate commerce," approved February 4, 1887, and amended by the acts of March 2, 1889, and February 10, 1891. 24 Stat. 379, c. 104; 25 Stat. 855, c. 382; 26 Stat. 743, c. 128; 1 Supp. Rev. St. 529, 684, 891.

The petition was based on the twelfth section of the act authorizing the Commission to invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses, and the production of documents, books, and papers.

The circuit court held that section to be unconstitutional and void, as imposing on the judicial tribunals of the United States duties that were not judicial in their nature. In the judgment of that court, this proceeding was not a case to which the judicial power of the United States extended, 53 Fed. 476, 480. . . .

The twelfth section (26 Stat. 743, c. 128), the validity of certain parts of which is involved in this proceeding, provides as follows:

"That the Commission hereby created shall have authority to inquire into the management of the business of all common carriers subject to the provisions of this act, and shall keep itself informed as to the manner and method in which the same is conducted, and shall have the right to obtain from such common carriers full and complete information necessary to enable the Commission to perform the duties and carry out the objects for which it was created; and the Commission is hereby

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ment would not aid the present legislative objectives, it would have a salutary effect as to the future. See "Legislative Power to Punish for Contempt," 3 Geo. Wash. L. Rev. 468 (1935).

authorized and required to execute and enforce the provisions of this act; and, upon the request of the Commission it shall be the duty of any district attorney of the United States to whom the Commission may apply to institute in the proper court and to prosecute under the direction of the attorney general of the United States all necessary proceedings for the enforcement of the provisions of this act and for the punishment of all violations thereof, and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States; and for the purposes of this act the Commission shall have power to require, by subpoena, the attendance and testimony of witnesses and the production of all books, papers, tariffs, contracts, agreements and documents relating to any matter under investigation.

"Such attendance of witnesses and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing. And in case of disobedience to a subpoena the Commission, or any party to a proceeding before the Commission, may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of books, papers, and documents under the provisions of this section.

"And any of the circuit courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any common carrier subject to the provisions of this act, or other person, issue an order requiring such common carrier or other person to appear before said Commission (and produce books and papers if so ordered) and give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof. The claim that any such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such witness from testifying; but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding." . . .

The answers of Brimson, Keefe, and Sterling in the present proceeding, besides insisting that the questions propounded to them, respectively, were immaterial and irrelevant, were based mainly upon the ground that so much of the Interstate Commerce Act as empowered the Commission to require the attendance and testimony of witnesses and the production of books, papers, and documents, and authorizes the circuit court of the United States to order common carriers or persons to appear before the Commission and produce books and papers and give evidence, and to punish by process for contempt any failure to obey such order of the court, was repugnant to the Constitution of the United States.

Is the twelfth section of the Act unconstitutional and void, so far as it authorizes or requires the circuit courts of the United States to

use their process in aid of inquiries before the Commission? The court recognizes the importance of this question, and has bestowed upon it the most careful consideration.

As the Constitution extends the judicial power of the United States to all cases in law and equity arising under that instrument or under the laws of the United States, as well as to all controversies to which the United States shall be a party (article 3, § 2), and as the circuit courts of the United States are capable, under the statutes defining and regulating their jurisdiction, of exerting such power in cases or controversies of that character, within the limits prescribed by Congress (25 Stat. 434, c. 866), the fundamental inquiry on this appeal is whether the present proceeding is a "case" or "controversy," within the meaning of the Constitution. The circuit court, as we have seen, regarded the petition of the Interstate Commerce Commission as nothing more than an application by an administrative body to a judicial tribunal for the exercise of its functions in aid of the execution of duties not of a judicial nature, and accordingly adjudged that this proceeding did not constitute a case or controversy to which the judicial power of the United States could be extended.

At the same time the learned court said: "Undoubtedly, Congress may confer upon a nonjudicial body authority to obtain information necessary for legitimate governmental purposes, and make refusal to appear and testify before it touching matters pertinent to any authorized inquiry an offense punishable by the courts, subject, however, to the privilege of witnesses to make no disclosures which might tend to criminate them or subject them to penalties or forfeitures. A prosecution or an action for violation of such a statute would clearly be an original suit or controversy between parties, within the meaning of the Constitution, and not a mere application, like the present one, for the exercise of the judicial power in aid of a nonjudicial body." In *re Interstate Commerce Commission*, 53 Fed. 476, 480.

In other words, if the Interstate Commerce Act made the refusal of a witness duly summoned to appear and testify before the Commission, in respect to a matter rightfully committed by Congress to that body for examination, an offense against the United States, punishable by fine or imprisonment, or both, a criminal prosecution or an information for the violation of such a statute would be a case or controversy to which the judicial power of the United States extended; while a direct civil proceeding, expressly authorized by an act of Congress, in the name of the Commission, and under the direction of the attorney general of the United States, against the witness so refusing to testify, to compel him to give evidence before the Commission touching the same matter, would not be a case or controversy of which cognizance could be taken by any court established by Congress to receive the judicial power of the United States.

This interpretation of the Constitution would restrict the employment of means to carry into effect powers granted to Congress within much narrower limits than, in our judgment, are warranted by that instrument. . . .

What is a case or controversy to which, under the Constitution, the judicial power of the United States extends? Referring to the clause of that instrument which extends the judicial power of the United States to all cases in law and equity arising under the Constitution, the laws of the United States, and treaties made or that shall be made under their authority, this court, speaking by CHIEF JUSTICE MARSHALL, has said: "This clause enables the judicial department to receive jurisdiction to the full extent of the Constitution, laws, and treaties of the United States when any question respecting them shall assume such a form that the judicial power is capable of acting on it. That power is capable of acting only when the subject is submitted to it by a party who asserts his rights in the form prescribed by law. It then becomes a case, and the Constitution declares that the judicial power shall extend to all cases arising under the Constitution, laws, and treaties of the United States." *Osborn v. Bank*, 9 Wheat. 738, 819. And in *Den ex dem. Murray v. Improvement Co.*, 18 How. 272, 284, MR. JUSTICE CURTIS, after observing that Congress cannot withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity or admiralty, nor, on the other hand, bring under judicial power a matter which, from its nature, is not a subject for judicial determination, said: "At the same time there are matters involving public rights which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which Congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper." So, in *Smith v. Adams*, 130 U. S. 173, 9 Sup. Ct. 566, MR. JUSTICE FIELD, speaking for the court, said that the terms "cases" and "controversies," in the Constitution, embraced "the claims or contentions of litigants brought before the courts for adjudication by regular proceedings established for the protection or enforcement of rights, or the prevention, redress, or punishment of wrongs."

Testing the present proceeding by these principles, we are of opinion that it is one that can properly be brought under judicial cognizance.

We have before us an Act of Congress authorizing the Interstate Commerce Commission to summon witnesses and to require the production of books, papers, tariffs, contracts, agreements, and documents relating to the matter under investigation. The constitutionality of this provision—assuming it to be applicable to a matter that may be legally entrusted to an administrative body for investigation—is, we repeat, not disputed, and is beyond dispute. Upon everyone, therefore, who

owes allegiance to the United States, or who is within its jurisdiction, enjoying the protection that its government affords, rests an obligation to respect the national will as thus expressed, in conformity with the Constitution. As every citizen is bound to obey the law and to yield obedience to the constituted authorities, acting within the law, this power conferred upon the Commission imposes upon anyone summoned by that body to appear and to testify the duty of appearing and testifying, and upon anyone required to produce such books, papers, tariffs, contracts, agreements, and documents the duty of producing them, if the testimony sought, and the books, papers, etc., called for, relate to the matter under investigation, if such matter is one which the Commission is legally entitled to investigate, and if the witness is not excused, on some personal ground, from doing what the Commission requires at his hands. These propositions seem to be so clear and indisputable that any attempt to sustain them by argument would be of no value in the discussion. Whether the Commission is entitled to the evidence it seeks, and whether the refusal of the witness to testify or to produce books, papers, etc., in his possession, is or is not in violation of his duty or in derogation of the rights of the United States, seeking to execute a power expressly granted to Congress, are the distinct issues between that body and the witness. They are issues between the United States and those who dispute the validity of an Act of Congress and seek to obstruct its enforcement; and those issues, made in the form prescribed by the Act of Congress, are so presented that the judicial power is capable of acting on them.

The question so presented is substantially, if not precisely, that which would arise if the witness was proceeded against by an indictment under an Act of Congress declaring it to be an offense against the United States for anyone to refuse to testify before the commission after being duly summoned, or to produce books, papers, etc., in his possession upon notice to do so, or imposing penalties for such refusal to testify or to produce the required books, papers, and documents. A prosecution for such offense, or a proceeding by information to recover such penalties, would have as its real and ultimate object to compel obedience to the rightful orders of the Commission, while it was exerting the powers given to it by Congress; and such is the sole object of the present direct proceeding. The United States asserts its right, under the Constitution and laws, to have these appellees answer the questions propounded to them by the Commission, and to produce specified books, papers, etc., in their possession or under their control. It insists that the evidence called for is material in the matter under investigation; that the subject of investigation is within legislative cognizance, and may be inquired of by any tribunal constituted by Congress for that purpose. The appellees deny that any such rights exist in the general government, or that they are under a legal duty, even if such evidence be important or vital in



the enforcement of the Interstate Commerce Act, to do what is required of them by the Commission. Thus has arisen a dispute involving rights or claims asserted by the respective parties to it; and the power to determine it directly, and, as between the parties, finally, must reside somewhere. It cannot be that the general government, with all the power conferred upon it by the people of the United States, is helpless in such an emergency, and is unable to provide some method, judicial in form and direct in its operation, for the prompt and conclusive determination of this dispute.

As the circuit court is competent, under the law by which it was ordained and established, to take jurisdiction of the parties, and as a case arises under the Constitution or laws of the United States when its decision depends upon either, why is not this proceeding, judicial in form and instituted for the determination of distinct issues between the parties, as defined by formal pleadings, a case or controversy for judicial cognizance, within the meaning of the Constitution? It must be so regarded, unless, as is contended, Congress is without power to provide any method for enforcing the statute or compelling obedience to the lawful orders of the Commission, except through criminal prosecutions or by civil actions to recover penalties imposed for noncompliance with such orders. But no limitation of that kind upon the power of Congress to regulate commerce among the states is justified either by the letter or the spirit of the Constitution. Any such rule of constitutional interpretation, if applied to all the grants of power made to Congress, would defeat the principal objects for which the Constitution was ordained. As the issues are so presented that the judicial power is capable of acting on them finally as between the parties before the court, we cannot adjudge that the mode prescribed for enforcing the lawful orders of the Interstate Commerce Commission is not calculated to attain the object for which Congress was given power to regulate interstate commerce.

. . .

For the reasons stated the judgment is reversed, and the cause is remanded for further proceedings in conformity with this opinion. Reversed.

MR. JUSTICE FIELD was not present at the argument, and took no part in the consideration or decision of this case. MR. CHIEF JUSTICE FULLER, MR. JUSTICE BREWER, and MR. JUSTICE JACKSON dissented.<sup>2</sup>

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<sup>2</sup> A New York statute dealing with monopolies and restraints of trade gave the attorney general the privilege, whenever he had determined to commence an action under the act, of making application to any justice of the Supreme Court for an order directing any person named in the application to appear before the justice, or a referee designated by him, and to answer such questions as might be put and to produce such papers as might be called for. The application was required to state upon information and belief of the attorney general that the testimony of the persons named was material and necessary. It was made the duty of the justice to grant the application and the duty of the wit-

### Judicial Enforcement of Agency Subpoenas

The type of statute involved in the Brimson case allows the court to pass upon the appropriateness of the subpoena, and the witness therefore has all the protection accorded him in connection with subpoenas issued in court proceedings.

Suppose the statute made it mandatory upon the court, on application of an agency, to enter an order compelling obedience to the agency's subpoena. Would this be constitutional, or would it fall within the bar of the Langenberg case? See *In re Matter of Davies*, 168 N. Y. 89, 61 N. E. 118 (1901).

A related aspect of the problem of enforcement of agency subpoenas was involved in *Penfield Co. of California v. Securities & Exchange Commission*, 330 U. S. 585, 91 L. Ed. 1117, 67 S. Ct. 918 (1947). In the course of an investigation, the Commission issued a subpoena duces tecum directed to an officer of the company. When he refused to produce all of the desired documents, the Commission obtained an order from the federal court requiring their production. The officer still refused to comply fully, and contempt proceedings were instituted. The court thereupon adjudged the corporate officer to be in contempt, and imposed a fine of \$50, which was paid. The contempt had been purged, but the Commission still did not have all the documents it sought. On review, the supreme court ruled that in the absence of a holding by the district court that the Commission's request had become moot, or that the documents produced (fewer than the Commission requested) satisfied its legitimate needs, or that the additional documents sought were irrelevant to the Commission's statutory functions, it was an abuse of discretion for the lower court to refuse to

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ness to appear as ordered. The referee could punish for contempt in the event of refusal of a witness to testify. The proceeding could be brought *prior* to commencing an action under the act, for the purpose of discovering evidence concerning alleged monopolistic practices in order to aid the attorney general in formulating his complaint or preparing for trial of the action about to be brought. It was in the nature of preliminary discovery.

The defendant in a proceeding brought under the act contended that the act was void because of conferring nonjudicial duties upon judicial officers and because it was an inquisition into his private affairs and hence void for want of due process of law. The court held that the act should be so construed as to give the court the power to refuse to issue the order to testify if he should find that the attorney general was not contemplating starting an action, or if he should find that the testimony of the witness was not necessary or material to such action. So construed the discovery provisions were held valid. Said the court, "Through its legislative department the state can examine witnesses with reference to prospective legislation, and why can it not, through its judicial department, under an appropriate statute, examine witnesses in order to establish in court rights belonging to all its citizens, even if the testimony is not to be read in court, but is to be used for a purpose incidental to the trial." *Matter of Davies*, 168 N. Y. 89, 61 N. E. 118 (1901).

grant full remedial relief, i. e., imprison the witness until all the documents were produced, or the contempt otherwise purged.

### Right of Agency to Subpoena

**Jones v. Securities and Exchange Commission, Supreme Court of the United States, 1936. 298 U. S. 1, 80 L. Ed. 1015, 56 S. Ct. 654.**

[Jones had filed a registration statement in pursuance of section 6 (a) of the Securities Act of 1933 [15 USCA § 77f (a)] covering a proposed issue of participation trust certificates. The Commission issued a stop order pursuant to section 8 (d) pending hearing, set a date for hearing, and issued a subpoena commanding Jones to appear before the Commission bringing certain books and documents. Thereafter Jones asked permission to withdraw his registration statement and refused to appear with the books and documents. The Commission brought proceedings to compel compliance with the subpoena. The court held that the registrant had the right to withdraw his registration. Thereupon the Commission contended that even so it could proceed under section 19 (b) of the Securities Act which authorized it to issue a subpoena "for the purpose of all investigations which, in the opinion of the Commission, are necessary and proper for the enforcement of this act."]

MR. JUSTICE SUTHERLAND delivered the opinion of the court. . . .

The proceeding for a stop order having thus disappeared, manifestly it cannot serve as a basis for the order of the District Court compelling petitioner to appear, give testimony, and produce his private books and papers for inspection by the Commission. But the Commission contends that the order may rest upon the general power to conduct investigations which it says is conferred by section 19 (b). The difficulty with that is that the investigation was undertaken for the declared and sole purpose of determining whether a stop order should issue. The first action taken by the Commission was on May 20th, four days before the registration was to become effective under the statute. The Commission then, after averring that upon reasonable grounds it believed the registration statement was false in material facts, directed that stop order proceedings be instituted against the statement. It never has averred or directed anything else. This action was followed by a notice containing like recitals of a more detailed character, and calling upon the registrant to appear and show cause why a stop order should not be issued suspending the effectiveness of the statement. It was upon this direction and notice that all subsequent proceedings were had and upon which they must stand or fall. We do not interpret the order of the District Court, the substance of which has already been stated, as resting upon a different view.

Nothing appears in any of the proceedings taken by the Commission to warrant the suggestion that the investigation was undertaken or would be carried on for any other purpose or to any different end than

that specifically named. An official inquisition to compel disclosures of fact is not an end, but a means to an end; and it is a mere truism to say that the end must be a legitimate one to justify the means. The citizen, when interrogated about his private affairs, has a right before answering to know why the inquiry is made; and if the purpose disclosed is not a legitimate one, he may not be compelled to answer. Since here the only disclosed purpose for which the investigation was undertaken had ceased to be legitimate when the registrant rightfully withdrew his statement, the power of the Commission to proceed with the inquiry necessarily came to an end. Dissociated from the only ground upon which the inquiry had been based, and no other being specified, further pursuit of the inquiry, obviously, would become what MR. JUSTICE HOLMES characterized as a "fishing expedition . . . for the chance that something discreditable might turn up" (*Ellis v. Interstate Commerce Commission*, 237 U. S. 434, 445, 35 S. Ct. 645, 647, 59 L. Ed. 1036)—an undertaking which uniformly has met with judicial condemnation. In *re Pacific Ry. Commission* (C. C.), 32 F. 241, 250; *Kilbourn v. Thompson*, 103 U. S. 168, 190, 192, 193, 195, 196, 26 L. Ed. 377; *Boyd v. United States*, 116 U. S. 616, 6 S. Ct. 524, 29 L. Ed. 746; *Harriman v. Interstate Commerce Commission*, 211 U. S. 407, 419, 29 S. Ct. 115, 53 L. Ed. 253; *Federal Trade Commission v. American Tobacco Co.*, 264 U. S. 298, 305-307, 44 S. Ct. 336, 68 L. Ed. 696, 32 A. L. R. 786.

In *re Pacific Ry. Commission* involved the power of a congressional commission to investigate the private affairs, books and papers of officers and employees of certain corporations indebted to the government. That commission called before it the president of one of these corporations, required the production of private books and papers for inspection, and submitted interrogatories which the witness declined to answer. Acting under the statute, the commission sought a peremptory order from the circuit court to compel the witness to answer the interrogatories. The court, consisting of MR. JUSTICE FIELD, CIRCUIT JUDGE SAWYER and DISTRICT JUDGE SABIN, denied the motion of the district attorney for the order and discharged the rule to show cause. Opinions were rendered seriatim, the principal one by JUSTICE FIELD. The authority of the commission was definitely denied. That decision has frequently been cited and approved by this court. JUDGE SAWYER, in the course of his opinion (32 F. 241, at page 263), after observing that a bill in equity seeking a discovery upon general, loose, and vague allegations is styled "a fishing bill," and will, at once, be dismissed on that ground (*Story, Eq. Pl. § 325*), said: "A general, roving, offensive, inquisitorial, compulsory investigation, conducted by a commission without any allegations, upon no fixed principles, and governed by no rules of law, or of evidence, and no restrictions except its own will, or caprice,

is unknown to our Constitution and laws; and such an inquisition would be destructive of the rights of the citizen, and an intolerable tyranny. Let the power once be established, and there is no knowing where the practice under it would end."

The fear that some malefactor may go unwhipped of justice weighs as nothing against this just and strong condemnation of a practice so odious. And, indeed, the fear itself has little of substance upon which to rest. The federal courts are open to the government; and the grand jury abides as the appropriate constitutional medium for the preliminary investigation of crime and the presentment of the accused for trial.

The philosophy that constitutional limitations and legal restraints upon official action may be brushed aside upon the plea that good, perchance, may follow, finds no countenance in the American system of government. An investigation not based upon specified grounds is quite as objectionable as a search warrant not based upon specific statements of fact. Such an investigation, or such a search, is unlawful in its inception and cannot be made lawful by what it may bring, or by what it actually succeeds in bringing, to light. Cf. *Byars v. United States*, 273 U. S. 28, 29, 47 S. Ct. 248, 71 L. Ed. 520, and cases cited. If the action here of the Commission be upheld, it follows that production and inspection may be enforced not only of books and private papers of the guilty, but those of the innocent as well, notwithstanding the proceeding for registration, so far as the power of the Commission is concerned, has been brought to an end by the complete and legal withdrawal of the registration statement.

Exercise of "such a power would be more pernicious to the innocent than useful to the public"; and approval of it must be denied, if there were no other reason for denial, because, like an unlawful search for evidence, it falls upon the innocent as well as upon the guilty and unjustly confounds the two. *Entick v. Carrington*, 19 How. St. Tr. 1030, 1074, followed by this court in *Boyd v. United States*, 116 U. S. 616, 629, 630, 6 S. Ct. 524, 29 L. Ed. 746. No one can read these two great opinions, and the opinions in the *Pacific Ry. Commission* case, from which the foregoing quotation is made, without perceiving how closely allied in principle are the three protective rights of the individual—that against compulsory self-accusation, that against unlawful searches and seizures, and that against unlawful inquisitorial investigations. They were among those intolerable abuses of the Star Chamber, which brought that institution to an end at the hands of the Long Parliament in 1640. Even the shortest step in the direction of curtailing one of these rights must be halted *in limine*, lest it serve as a precedent for further advances in the same direction, or for wrongful invasions of the others.

The foregoing disposes of the case and requires a reversal of the judgment of the lower court. In that view, it becomes unnecessary to consider the constitutional validity of the act.

MR. JUSTICE CARDOZO, dissenting. I am unable to concur in the opinion of the court.

A subpoena duces tecum was issued by the Commission on June 13 before any attempt had been made to withdraw the registration statement. On June 18, the day of the attempted withdrawal, there was issued a second subpoena commanding the registrant to appear and testify, and this was served upon him by the marshal. Then and for months earlier a standing regulation gave warning to him and to the world that without consent of the Commission there could be no withdrawal of a statement once placed upon the files. I am persuaded that the rule is valid; that the Commission had abundant reasons for maintaining jurisdiction; and that notice of withdrawal did not nullify the writ.

The subpoena flouted by the witness was issued under section 19 (b), 15 USCA § 77s (b), of the statute as well as under section 8 (e), 15 USCA § 77h (e). (Section 8 (e) authorizes investigations in connection with stop orders.) So the sworn petition for the Commission explicitly informs us. It was issued in aid of any legitimate inquiry that the Commission had authority to initiate and prosecute by reason of a false and defective statement then part of the official records. Nothing in the case gives color to the argument that the witness was to be subjected to a roving examination without the restraints of pleadings or bounds analogous thereto. On the contrary, the order of the District Court upholding the subpoena directs him to make answer to questions pertinent to the documents already filed with the Commission, to these and nothing more. If the petitioner is to prevail in his attack upon the writ, it will have to be on broader grounds than those of form and method. He must be able to make good his argument that by the mere announcement of withdrawal, he achieves results analogous to those of a writ of prohibition.

Recklessness and deceit do not automatically excuse themselves by notice of repentance. Under section 24 of the Act, 15 USCA § 77x, there is the possibility, at times the likelihood, of penal liability. A statement wilfully false or wilfully defective is a penal offense to be visited, upon conviction, with fine or imprisonment. Under section 12, 15 USCA § 771, there is the possibility, if not the likelihood, of liability for damages. The statement now in question had been effective for over twenty days, and the witness did not couple his notice of withdrawal with an affidavit or even a declaration that securities had not been sold. Nor is the statute lacking in machinery with which to set these liabilities in motion upon appropriate occasion. Under section 19 (b), 15 USCA § 77s (b), plenary authority is conferred on the

Commission to conduct all investigations believed to be necessary and proper for the enforcement of the act and of any of its provisions. There will be only partial attainment of the ends of public justice unless retribution for the past is added to prevention for the future. But the opinion of the court teaches us that however flagrant the offense and however laudable the purpose to uncover and repress it, investigations under section 19 (b) will be thwarted on the instant when once the statement of the registrant has been effectively withdrawn. If that is so, or even indeed if the effect of the retraction is to embarrass the inquiry—to cloud the power to continue—the fairness of the rule is proved out of the mouths of its accusers. If such consequences are inherent in a privilege of withdrawal indiscriminately bestowed, there is need of some restraint upon the power of the wrongdoer to mitigate the penalties attaching to his wrong. Shall the truth be shown forth or buried in the archives? The Commission is to determine in the light of all the circumstances, including its information as to the conduct of the applicant, whether the public interest will be prompted by forgetting and forgiving. *Bronx Brass Foundry, Inc. v. Irving Trust Co.*, 297 U. S. 230, 56 S. Ct. 451, 80 L. Ed. 657.

The objection is inadequate that an investigation directed to the discovery of a crime is one not for the Commission, but for the prosecuting officer. There are times when the functions of the two will coincide or overlap. Congress has made it plain that any inquiry helpful in the enforcement of the statute may be pursued by the commission, though conduct punishable as a crime may thereby be uncovered. Indeed, the act is explicit (section 22 (c), 15 USCA § 77v (c) that a witness is not excused from testifying on the ground that the testimony required of him may tend to incriminate him or expose him to a penalty or forfeiture. He may, however, claim his privilege, and if then compelled to testify, may not be prosecuted thereafter for any matter thus revealed. All this is far from proving that there can be no practical advantage in keeping the proceeding open. Aside from the possibility of civil liability, the offender may not choose to claim the privilege, and even if he does and is then excused from testifying, the other witnesses may be available, for example, employees, who are not implicated in the offense and who can bring the facts to view. Moreover, amnesty for one offender may mean conviction for another, an associate in the crime. Inquiry by the Commission is thus more penetrating and efficient than one by a grand jury where there is no statutory grant of amnesty to compel confederates to speak. More important still, the enforcement of the act is aided when guilt is exposed to the censure of the world, though the witness in the act of speaking may make punishment impossible. It is no answer to all this that upon the record now presented a crime has not been proved or even definitely charged. An investigator is not expected to prove or

charge at the beginning the offenses which he has reason to suspect will be uncovered at the end. The petition in behalf of the Commission enumerates one by one the false statements and the omissions imputed to the registrant. Some at least are of such a nature that if chargeable to him at all, they can hardly have been made otherwise than with criminal intent. To give the investigating officer an opportunity to reach down into the hidden wells of knowledge and the more hidden wells of motive is the very purpose of the regulation by which the proceeding is kept open after the registrant has tried to end it.

The opinion of the court reminds us of the dangers that wait upon the abuse of power by officialdom unchained. The warning is so fraught with truth that it can never be untimely. But timely too is the reminder, as a host of impoverished investors will be ready to attest, that there are dangers in untruths and half truths when certificates masquerading as securities pass current in the market. There are dangers in spreading a belief that untruths and half truths, designed to be passed on for the guidance of confiding buyers, are to be ranked as peccadillos, or even perhaps as part of the amenities of business. When wrongs such as these have been committed or attempted, they must be dragged to light and pilloried. To permit an offending registrant to stifle an inquiry by precipitate retreat on the eve of his exposure is to give immunity to guilt; to encourage falsehood and evasion; to invite the cunning and unscrupulous to gamble with detection. If withdrawal without leave may check investigation before securities have been issued, it may do as much thereafter, unless indeed consistency be thrown to the winds, for by the teaching of the decision withdrawal without leave is equivalent to a stop order, with the result that forthwith there is nothing to investigate. The statute and its sanctions become the sport of clever knaves.

Appeal is vaguely made to some constitutional immunity, whether express or implied is not stated with distinctness. It cannot be an immunity from the unreasonable search or seizure of papers or effects: the books and documents of the witness are unaffected by the challenged order. It cannot be an immunity from impertinent intrusion into matters of strictly personal concern: the intimacies of private business lose their self-regarding quality after they have been spread upon official records to induce official action. In such circumstances, the relevance of *Entick v. Carrington*, 19 How. St. Tr. 1030, 1074, or *Boyd v. United States*, 116 U. S. 616, 629, 6 S. Ct. 524, 29 L. Ed. 746, or the *Matter of the Pacific Railway Commission (C. C.)*, 32 F. 241, 250 is not readily perceived. Cf. *Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 469, 478, 14 S. Ct. 1125, 38 L. Ed. 1047. If the immunity rests upon some express provision of the Constitution, the opinion of the court does not point us to the article or section. If its source is to be found in some impalpable essence, the spirit of the Constitution or the philos-



ophy of government favored by the Fathers, one may take leave to deny that there is anything in that philosophy or spirit whereby the signer of a statement filed with a regulatory body to induce official action is protected against inquiry into his own purpose to deceive. The argument for immunity lays hold of strange analogies. A Commission which is without coercive powers, which cannot arrest or amerce or imprison though a crime has been uncovered or even punish for contempt, but can only inquire and report, the propriety of every question in the course of the inquiry being subject to the supervision of the ordinary courts of justice, is likened with denunciatory fervor to the Star Chamber of the Stuarts. Historians may find hyperbole in the sanguinary simile.

The rule now assailed was wisely conceived and lawfully adopted to foil the plans of knaves intent upon obscuring or suppressing the knowledge of their knavery.

The witness was under a duty to respond to the subpoena.

MR. JUSTICE BRANDEIS and MR. JUSTICE STONE join in this opinion.<sup>3</sup>

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<sup>3</sup> Justice Robert H. Jackson, in his book, "The Struggle for Judicial Supremacy," written in 1941 when he was Attorney General of the United States, criticizes the majority opinion in the Jones case in no uncertain terms. After describing the litigation and quoting from majority and dissenting opinions he says of the former:

"Those in, or sympathetic to, its administration felt that the opinion of the majority struck a fatal blow. Seizing a case in which the Securities and Exchange Commission had, at the worst perhaps, misunderstood the law, though three of the most respected of the Justices insisted that the Commission had not even done that, the majority used the occasion to write an opinion which did all that a court's opinion could to discredit its commission, its motives, its methods, and its existence. It had declared a hostility to the whole philosophy of preventing frauds by publicity and a preference for only the grand jury secret investigation and criminal trials which had long proved futile to reach the subtler kinds of fraud at all, and able to reach the grosser frauds only rarely. Every trickery known in the investment business hailed the opinion, and the enemies of the administration seized it to drive home the charge that the New Deal was destroying old liberties."

Other students viewed the decision in the Jones case as a throwback to the earlier days of strict construction. In the often cited case of *Harriman v. Interstate Commerce Commission*, 211 U. S. 407, 53 L. Ed. 253, 29 S. Ct. 115 (1908) the Commission asserted a right to inquire as to the railroad magnate's private speculations in the stock of several railroad companies. The Commission had been given by statute the right to require testimony "for the purpose of this act"; and it urged that since one of the purposes of the Act was to have the Commission make recommendations to Congress for legislation to improve the railroad service, and since any improper use of corporate power to advance or depress stock prices would be a proper subject for legislation, the Commission should be entitled to the information it sought. The court disagreed.

However, after a few years had passed, and a minor amendment to the statute had been adopted, the court held in *Smith v. Interstate Commerce Commission*, 245 U. S. 33, 62 L. Ed. 135, 38 S. Ct. 30 (1917), that the Commission could

**Fleming v. Montgomery Ward & Co., Inc., Circuit Court of Appeals, Seventh Circuit, 1940. 114 F. (2d) 384.**

Petition by Philip B. Fleming, Administrator of the Wage and Hour Division, United States Department of Labor, against Montgomery Ward & Company, Incorporated, to require respondent to comply with a subpoena duces tecum which had been issued by petitioner pursuant to authorization of the Fair Labor Standards Act of 1938, 29 USCA § 201 et seq. From a judgment of the District Court (30 F. Supp. 380) for petitioner, the respondent appeals.

TREANOR, Circuit Judge. This is an appeal from the order of the District Court requiring respondent to comply with a subpoena duces tecum which had been issued by petitioner pursuant to authorization of the Fair Labor Standards Act of 1938.

Respondent is a corporation engaged in a general merchandising business carried on throughout the United States, and maintains and operates one of its branches in Kansas City, Missouri. This branch consists of a mail order house and a retail store; and at least 80% of the goods

require a railroad president to testify whether the railroad company had spent corporate funds in state political campaigns.

A comparison of the administrative tribunal seeking evidence of violation of the law with the grand jury and its subpoena powers is revealing. As to the latter, see Wharton, "Criminal Procedure" (10th Ed.) § 1264. Compare *Hale v. Henkel*, 201 U. S. 43, 65, 50 L. Ed. 652, 26 S. Ct. 370 (1906) and *Blair v. United States*, 250 U. S. 273, 63 L. Ed. 797, 39 S. Ct. 468 (1919). See Dession and Cohen "The Inquisitorial Functions of Grand Juries," 41 Yale L. Jour. 687 (1932).

In *re Morse*, 42 Misc. 664, 87 N. Y. Supp. 721 (1904) contains the following:

"The grand jury have power, and it is their duty, to inquire into all crimes committed or triable in the county. Except in special cases specified by law, their power to inquire is limited to crimes committed or triable in the county. In order for them to exercise that power, it must be made to appear by complaint or information or knowledge acquired that there is reason to believe that a crime has been committed. They have not the power to institute or prosecute an inquiry on chance or speculation that some crime may be discovered. Such an inquisition based upon mere suspicion, would be odious and oppressive and would not be tolerated by our laws. There must be a reason to believe that a crime of a specific character has been committed by a particular person, whose name may be either known or unknown to the grand jury. When they have reason to believe that a crime has been committed, they have power to summon and compel the attendance of any witness and examine him on all matters that are relevant and material to the subject of the inquiry. They have not the power to summon a witness and examine him upon matters that are wholly unconnected with or unrelated to the subject of inquiry. The process of the grand jury can be used only for the purpose of aiding a lawful inquiry, and it must not be used for the purpose of oppression or harassment."

For a discussion of all phases of the inquisitorial powers in the field of securities regulations, see Rush, "Expansion of Federal Supervision of Securities through the Inquisitorial and Census Power of Congress—a Suggestion," 36 Mich. L. Rev. 409 (1938); and also MacChesney, "Further Developments in 'Disclosure' Under the Securities Act," 33 Ill. L. Rev. 145 (1938).

received by such mail order house is shipped from sources without the state of Missouri and the mail order house sends, transports and sells merchandise to points outside the state. Respondent's operation of its Kansas City plant brings it within the terms of the Fair Labor Standards Act as an employer of employees engaged in interstate commerce or in the production of goods for interstate commerce.

Petitioner undertook an investigation of the acts and practices of respondent in its Kansas City branch relating to hours of employment, wages paid, classification of employees, and discriminatory acts. By the terms of the Fair Labor Standards Act, which will be referred to hereinafter as the "Act," the petitioner is authorized, as Administrator of the Wage and Hour Division, United States Department of Labor, to conduct investigations of the acts and practices of respondent relating to the foregoing subjects.

In the course of the investigation petitioner issued a subpoena duces tecum which required the respondent to produce (1) the records of a six months period showing wages paid to, and timeclock cards of, employees in the mail order branch at Kansas City, (2) the records showing the number of hours scheduled for each department of the mail order branch for the same period, and (3) the record of the actual number of hours worked by each of the departments during such period. Respondent refused to comply with the subpoena and petitioner thereupon applied to the District Court for an enforcement order. As a result of the proceeding in the District Court the respondent was ordered to appear before petitioner and produce the records designated in items one and two of the subpoena.

Respondent does not urge that the Act is unconstitutional, but does urge that the requirements of the subpoena were unreasonable and that its enforcement would operate to deprive respondent of its rights under the Fourth Amendment to the Federal Constitution. Respondent further urges that the trial court's refusal to permit it to develop the facts surrounding the issuance of the subpoena duces tecum deprived respondent of its day in court.

Petitioner averred below that he had reasonable grounds to believe that respondent had violated the provisions of Sections 7, 11 (c), 15 (a) (1), (2), (3), and (5), and certain regulations which had been promulgated under authority of the Act. Respondent answered that petitioner had no reasonable cause to suspect the existence of violations of the Act. And on appeal respondent urges as one ground of error by the District Court that respondent was not permitted to introduce evidence for the purpose of showing that the petitioner had no reasonable cause to believe that respondent was violating the Act. And in conjunction with the foregoing respondent argues that, in the absence of a showing of reasonable cause to believe that respondent was violating

the Act, the issuance and enforcement of the subpoena duces tecum would constitute an unreasonable search and seizure.

We shall consider first petitioner's claim that he may inspect respondent's records relating to matters regulated and controlled by the Act without showing reasonable grounds to believe that a violation of the Act has occurred.

Respondent is a corporation and as such is not protected by immunity against self-incrimination which is guaranteed by the Fifth Amendment. Hence, the forced production of the records cannot be said to be unreasonable because it might deprive respondent of the benefit of immunity against self-incrimination. A corporation is entitled, however, to the protection of the Fourth Amendment against unreasonable searches and seizures of its papers.

The scope and purpose of the Act, the proper exercise of the authority conferred upon the Administrator, and the effective performance of his duties, are inconsistent with an intention to limit inspections of books and records to cases in which the Administrator has reasonable cause to believe an employer is violating the provisions of the Act.

Section 2 of the Act sets out a legislative finding and declaration of policy which constitute the legislative justification of the Act as a regulation of commerce. Congress declares, as a finding of fact, that the existence in industries engaged in interstate commerce or in the production of goods for such commerce, of labor conditions detrimental to the maintenance of a minimum standard of living necessary for health, efficiency, and well-being of workers affect interstate commerce; and Congress declares that the policy of Congress is to eliminate such conditions. Section 4 creates a Wage and Hour Division (in the Department of Labor) which is placed under the direction of an Administrator. The Administrator is required to make an annual report to Congress of his activities, such report to include "such information, data, and recommendations for further legislation in connection with the matters covered by (the) Act [this chapter] as he may find advisable." Section 5 requires the Administrator to appoint an "industry committee" for each industry, and Sections 6 and 7 fix a minimum wage standard and a maximum hour standard, respectively. Section 8, in conjunction with Section 6 (a) (3) and (4) provides for the investigation of industry conditions by the industry committee and for a recommendation of minimum wage rates and classifications within the industry. The Administrator is required to approve or disapprove of such recommendations. Section 11 (a) authorizes the Administrator to "investigate and gather data regarding the wages, hours, and other conditions and practices of employment . . . and [to] enter and inspect such places and such records . . . and investigate such facts, conditions, practices, or matters as he may deem necessary or appropriate to determine whether any person has violated any provision of (the) Act [this

chapter], or which may aid in the enforcement of the provisions of (the) Act [this chapter]." Section 11 (c) requires employers to make and keep records of wages, hours and other conditions of employment and to make reports therefrom, as prescribed by regulations of the Administrator "as necessary or appropriate for the enforcement of the provisions of (the) Act [this chapter]. . . ." And in conformity with the foregoing the respondent has made certain regulations regarding the making and keeping of records.

It is apparent from this cursory analysis of pertinent provisions of the Act that Congress has conferred upon the Administrator of the Wage and Hour Division broad powers of regulation and supervision which are accompanied, for the purpose of giving effect thereto, by investigatory duties and powers which are designed especially to enable the Administrator to have available at all times detailed information respecting the conditions and practices of employment, including information respecting wages and hours of labor. The duties of the Administrator go far beyond the relatively simple task of instituting punitive actions against employers for occasional violations of the Act. The Administrator is authorized to inspect in order "to determine whether any person has violated the Act," not merely to corroborate a previously formed belief of violation; and he is authorized to make inspections "which may aid in the enforcement" of the Act. Section 4 (d) requires the Administrator to make an annual report to Congress which shall include "information, data, and recommendations for further legislation in connection with the matters covered by (the) Act [this chapter]. . . ." The Administrator, in conjunction with the industry committee, enjoys a wide discretion in fixing minimum wage rates and maximum hours. The Administrator is required to submit to the committee "from time to time such data as he may have available on the matters referred to it." Section 11 (c) empowers the Administrator to prescribe by regulation the making and keeping of records of "wages, hours, and other conditions and practices of employment."

We are of the opinion that the terms of the Act necessarily indicate a legislative intent that the exercise of the investigatory powers of the Administrator be in no degree conditioned upon the existence of reasonable cause for the Administrator to believe that the industry, which is the subject of investigation, is violating the Act.

Respondent insists that "no case has upheld a search and seizure in the absence of probable cause . . . except when the search and seizure has been directed against a public utility, common carrier, or the like." But even if we assume the accuracy of the statement, it does not follow that the decisions hold that probable cause is dispensed with only in case of public utility corporations. And we are of the opinion that the cases do not so hold. . . .

[Thereupon the court examined the earlier cases.]

The reasoning and holding of the Supreme Court in the foregoing cases are inconsistent with the contention that enforced inspection of the books and records of a corporation constitutes an unreasonable search and seizure in the absence of the existence of probable cause to believe that the corporation is guilty of an unlawful act. In general, the cases hold that there must be a demand suitably made by duly constituted authority; that such demand be expressed in lawful process, and that the lawful process limit its requirements to certain described documents and papers which are easily distinguished and clearly described. Also, there must be relevancy to the subject of investigation.

The reasoning of the cases, and the tests of lawful inspection are broad enough to apply equally, on principle, to non-public as well as public utility corporations. And we are of the opinion that the decisions of the Supreme Court, and at least one decision of this Court, have established clearly that when Congress, in the exercise of its power under the commerce clause, has created an administrative agency with power to regulate and supervise the conduct of an industry and has authorized such administrative agency to inspect books and records for the purpose of enabling the agency to perform its functions under the Act, the same principles that have been applied to inspection of books and records by the Interstate Commerce Commission are applicable to inspections by such other administrative agency. . . .

[The court thereupon examined the decision of the United States Supreme Court in *Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 38 L. Ed. 1047, 14 S. Ct. 1125, and the Circuit Court of Appeals decision in *Bartlett Frazier Co. v. Hyde*, 65 F. (2d) 350, post, p. 280, and reached the following conclusion.]

When Congress, acting in the public interest, has the power to regulate and supervise the conduct of any particular business under the commerce clause, an administrative agency may be authorized to inspect books and records and to require disclosure of information regardless of whether the business is a public utility and regardless of whether there is any pre-existing probable cause for believing that there has been a violation of the law. Neither of the foregoing elements enters into the question of the reasonableness of the investigation. . . .

. . . It is undoubtedly true that, for purposes of regulation, the affairs of a railroad company are more public than the affairs of a private corporation. As already suggested in this opinion, the power of Congress to regulate railroad companies is based upon the commerce clause; but when Congress exercises the power to regulate railroad companies which are engaged in interstate commerce, the scope of potential regulation is enlarged by the fact that railroad companies are public utilities. In the case of private corporations that are not engaged in the business of a public utility the scope of the regulatory power of Congress is limited by the requirement that the purposes and effects of the regulation must bear some relation to interstate commerce. Since

the valid scope of regulation of a railroad company, as an interstate public carrier, is necessarily extremely broad, the scope of the incidental power of inspection is correspondingly broad. But in the case of a private corporation which is subject to regulation by Congress only for the protection of interstate commerce, the potential scope of valid regulation is not as great as in the case of a public carrier engaged in interstate commerce; and the scope of inspection of books and records will be correspondingly limited. In view of the broad power of regulation of interstate public carriers, it is difficult to conceive of a case in which the Interstate Commerce Commission would be seeking to inspect a record or document which would not be relevant to a lawful activity of the Commission. We assume, however, that if such a case were presented, the right to require production of a record or document would be denied.

We conclude that when Congress, in the exercise of its plenary power of regulation under the commerce clause, creates an administrative agency with power to regulate and supervise the acts and practices of an industry in order to safeguard commerce, and requires records to be kept to have available to the agency information respecting specified subjects, and requires the agency to enforce the requirement to keep such records, such administrative agency is entitled to inspect the records at any time to obtain the information and for the further purpose of determining whether or not such records are being kept, and whether or not they are being kept in such a way as to make available the specified information.

The decisions afford ample authority for the order of production in the instant case, which covered certain specified and particularized records covering a stated period of time and containing wage and hour information. The wage and hour information is relevant to an investigation of respondent's acts and practices regarding hours of employment, wages paid, classification of employees, and discriminatory acts, all of which subjects of investigation are matters controlled and regulated by the Act. Since respondent is subject to the Act, the investigation is a lawful inquiry. In the instant case the demand was suitably made by a duly constituted authority; and the demand "was expressed in lawful process, confining its requirements to certain described documents and papers easily distinguished and clearly described." The order requires production of records which will enable the Administrator to determine hours actually worked by the employees in a single mail order house, the hours scheduled for each department for such house, and the wages actually paid the employees, the disclosure of such information being restricted to a limited period of time. . . .

The order of the District Court is affirmed.<sup>4</sup>

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<sup>4</sup> Certiorari denied, 311 U. S. 690, 85 L. Ed. 446, 61 S. Ct. 71 (1940). The case is a landmark in the evolution of constitutional limitations upon administrative

**Oklahoma Press Publishing Co. v. Walling, Wage and Hour Administrator, Supreme Court of the United States, 1946. 327 U. S. 186, 90 L. Ed. 614, 66 S. Ct. 494.**

MR. JUSTICE RUTLEDGE delivered the opinion of the court.

These cases bring for decision important questions concerning the Administrator's right to judicial enforcement of subpoenas duces tecum issued by him in the course of investigations conducted pursuant to § 11 (a) of the Fair Labor Standards Act. 52 Stat. 1060. His claim is founded directly upon § 9, which incorporates the enforcement provisions of §§ 9 and 10 of the Federal Trade Commission Act, 38 Stat. 717. The subpoenas sought the production of specified records to determine whether petitioners were violating the Fair Labor Standards Act, including records relating to coverage. Petitioners, newspaper publishing corporations, maintain that the Act is not applicable to them, for constitutional and other reasons, and insist that the question of coverage must be adjudicated before the subpoenas may be enforced.

...  
The primary source of misconception concerning the Fourth Amendment's function lies perhaps in the identification of cases involving so-called "figurative" or "constructive" search with cases of actual search and seizure. Only in this analogical sense can any question related to search and seizure be thought to arise in situations which, like the present ones, involve only the validity of authorized judicial orders.

The confusion is due in part to the fact that this is the very kind of situation in which the decisions have moved with variant direction, although without actual conflict when all of the facts in each case are taken into account. Notwithstanding this, emphasis and tone at times are highly contrasting, with consequent overtones of doubt and confusion for validity of the statute or its application. The subject matter perhaps too often has been generative of heat rather than light, for the border along which the cases lie is one where government intrudes upon different areas of privacy and the history of such intrusions has brought forth some of the stoutest and most effective instances of resistance to excess of governmental authority.

The matter of requiring the production of books and records to secure evidence is not as one-sided, in this kind of situation, as the most extreme expressions of either emphasis would indicate. With some obvious exceptions, there has always been a real problem of balancing the

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inquisitorial powers. The case is discussed by McKenna in "Courts and Administrative Agencies—Investigatory Powers of Administrative Tribunals Extended," 29 Geo. L. Jour. 328 (1940). Also see comment in 40 Mich. L. Rev. 78 (1941); 28 Minn. L. Rev. 261 (1941); 26 Wash. Univ. L. Q. 531 (1941); and for a general discussion of the problems of this chapter, Davis, "The Administrative Power of Investigation," 56 Yale L. Jour. 1111 (1947).



public interest against private security. The cases for protection of the opposing interests are stated as clearly as anywhere perhaps in the summations, quoted in the margin, of two former members of this Court, each of whom was fully alive to the dual necessity of safeguarding adequately the public and the private interest. But emphasis has not always been so aptly placed.

The confusion, obscuring the basic distinction between actual and so-called "constructive" search has been accentuated where the records and papers sought are of corporate character, as in these cases. Historically private corporations have been subject to broad visitorial power, both in England and in this country. And it long has been established that Congress may exercise wide investigative power over them, analagous to the visitorial power of the incorporating state, when their activities take place within or affect interstate commerce. Correspondingly it has been settled that corporations are not entitled to all of the constitutional protections which private individuals have in these and related matters. As has been noted, they are not at all within the privilege against self-incrimination, although this Court more than once has said that the privilege runs very closely with the Fourth Amendment's search and seizure provisions. It is also settled that an officer of the company cannot refuse to produce its records in his possession, upon the plea that they either will incriminate him or may incriminate it. And, although the Fourth Amendment has been held applicable to corporations notwithstanding their exclusion from the privilege against self-incrimination, the same leading case of *Wilson v. United States*, 221 U. S. 361, distinguishing the earlier quite different one of *Boyd v. United States*, 116 U. S. 616, held the process not invalid under the Fourth Amendment, although it broadly required the production of copies of letters and telegrams "signed or purporting to be signed by the President of said company during the month[s] of May and June, 1909; in regard to an alleged violation of the statutes of the United States by C. C. Wilson." 221 U. S. at 368, 375.

The *Wilson* case has set the pattern of later decisions and has been followed without qualification of its ruling. Contrary suggestions or implications may be explained as dicta; or by virtue of the presence of an actual illegal search and seizure, the effects of which the Government sought later to overcome by applying the more liberal doctrine developed in relation to "constructive search"; or by the scope of the subpoena in calling for documents so broadly or indefinitely that it was thought to approach in this respect the character of a general warrant or writ of assistance, odious in both English and American history. But no case has been cited or found in which, upon similar facts, the *Wilson* doctrine has not been followed. Nor in any has Congress been adjudged to have exceeded its authority, with the single exception of *Boyd v. United States*, *supra*, which differed from

both the Wilson case and the present ones in providing a drastically incriminating method of enforcement which was applied to the production of partners' business records. Whatever limits there may be to congressional power to provide for the production of corporate or other business records, therefore, they are not to be found, in view of the course of prior decisions, in any such absolute or universal immunity as petitioners seek.

Without attempt to summarize or accurately distinguish all of the cases, the fair distillation, in so far as they apply merely to the production of corporate records and papers in response to a subpoena or order authorized by law and safeguarded by judicial sanction, seems to be that the Fifth Amendment affords no protection by virtue of the self-incrimination provision, whether for the corporation or for its officers; and the Fourth, if applicable, at the most guards against abuse only by way of too much indefiniteness or breadth in the things required to be "particularly described," if also the inquiry is one the demanding agency is authorized by law to make and the materials specified are relevant. The gist of the protection is in the requirement, expressed in terms, that the disclosure sought shall not be unreasonable.

As this has taken form in the decisions, the following specific results have been worked out. It is not necessary, as in the case of a warrant, that a specific charge or complaint of violation of law be pending or that the order be made pursuant to one. It is enough that the investigation be for a lawfully authorized purpose, within the power of Congress to command. This has been ruled most often perhaps in relation to grand jury investigations, but also frequently in respect to general or statistical investigations authorized by Congress. The requirement of "probable cause, supported by oath or affirmation" literally applicable in the case of a warrant is satisfied, in that of an order for production, by the court's determination that the investigation is authorized by Congress, is for a purpose Congress can order, and the documents sought are relevant to the inquiry. Beyond this the requirement of reasonableness, including particularity in "describing the place to be searched, and the persons or things to be seized," also literally applicable to warrants, comes down to specification of the documents to be produced adequate, but not excessive, for the purposes of the relevant inquiry. Necessarily, as has been said, this cannot be reduced to formula; for relevancy and adequacy or excess in the breadth of the subpoena are matters variable in relation to the nature, purposes and scope of the inquiry.

MR. JUSTICE MURPHY, dissenting.

It is not without difficulty that I dissent from a procedure the constitutionality of which has been established for many years. But I am unable to approve the use of nonjudicial subpoenas issued by administrative agents.

Administrative law has increased greatly in the past few years and seems destined to be augmented even further in the future. But attending this growth should be a new and broader sense of responsibility on the part of administrative agencies and officials. Excessive use or abuse of authority can not only destroy man's instinct for liberty but will eventually undo the administrative processes themselves. Our history is not without a precedent of a successful revolt against a ruler who "sent hither swarms of officers to harass our people."

Perhaps we are too far removed from the experiences of the past to appreciate fully the consequences that may result from an irresponsible though well-meaning use of the subpoena power. To allow a non-judicial officer, unarmed with judicial process, to demand the books and papers of an individual is an open invitation to abuse of that power. It is no answer that the individual may refuse to produce the material demanded. Many persons have yielded solely because of the air of authority with which the demand is made, a demand that cannot be enforced without subsequent judicial aid. Many invasions of private rights thus occur without the restraining hand of the judiciary ever intervening.

Only by confining the subpoena power exclusively to the judiciary can there be any insurance against this corrosion of liberty. Statutory enforcement would not thereby be made impossible. Indeed, it would be made easier. A people's desire to cooperate with the enforcement of a statute is in direct proportion to the respect for individual rights shown in the enforcement process. Liberty is too priceless to be forfeited through the zeal of an administrative agent.

### Limits on Scope of Agency Subpoena

As indicated by the decision in the Oklahoma Press case, objections to the scope of an agency subpoena may be raised on three principal grounds: (1) lack of statutory authority; (2) irrelevancy of the information sought; (3) unduly oppressive nature of the demand.<sup>5</sup> In applying these three tests, many difficult questions arise, producing substantial diversities of rulings in the federal district courts, and the courts of appeal.

*Statutory Authority.* Under many statutes, federal agencies have power to subpoena the documents in possession of a respondent only if the respondent is "engaged in commerce."<sup>6</sup> Not infrequently, an agency believes that respondent is so engaged, but respondent denies it. The

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<sup>5</sup> At least, this is the situation in the federal courts, when the subpoena of a federal agency is resisted. Some state courts recognize other grounds of objection, particularly where breadth of a subpoena is such as to suggest that the agency is engaged in a "fishing expedition."

<sup>6</sup> The statutory phraseology varies. It may refer to "affecting commerce," "production of goods for commerce," or the like; but the problem is the same.

agency has statutory authority to issue the subpoena only if respondent is in fact engaged in commerce, but the agency cannot prove whether respondent is engaged in commerce except by subpoenaing the documents which would establish whether or not respondent was so engaged.

How should this dilemma be solved? Many suggestions have been made.

At one extreme, it may be said that the agency's preliminary *ex parte* determination of the fact that the applicable statute authorizes it to investigate respondent's affairs is to be accepted by the court. Such was the approach in *Endicott Johnson Corp. v. Perkins*, 317 U. S. 501, 87 L. Ed. 424, 63 S. Ct. 339 (1943), where the Secretary of Labor subpoenaed payroll records of a company which the agency was authorized to examine only if the employees were covered by the Walsh-Healey Act. The district court tried the issue of coverage itself, and decided it against the Secretary of Labor, and refused to enforce the subpoena. The supreme court held this to be error, and ruled that the subpoena should have been enforced, without judicial examination of the question as to the agency's jurisdiction. This case has evoked numerous comments in the law reviews. See 43 Columbia L. Rev. 254 (1943); 11 Geo. Wash. L. Rev. 377 (1943); 91 U. of Pa. L. Rev. 563 (1943); 52 Yale L. J. 175 (1942). *Quaere*: Is the decision in *Endicott Johnson* inconsistent with the provision of Sec. 6 (c) of the Federal Administrative Procedure Act (enacted three years after the supreme court's decision) that ". . . the court shall sustain any such subpoena or similar process or demand to the extent that it is found to be in accordance with law . . ."?

At the opposite extreme, it could be ruled that the agency subpoena would not be enforced unless and until the agency established, by other evidence, that respondent's activities were within the sphere of the agency's jurisdiction. This view was apparently adopted in *General Tobacco & Grocery Co. v. Fleming* (CCA 6th, 1942), 125 F. (2d) 596. But cf. the later decision of the same court in *Walling v. LaBelle S. S. Co.* (CCA 6th, 1945), 148 F. (2d) 198.

Many intermediate approaches to the problem deserve consideration.

For example, a court might rule that respondent would be required to produce only those documents from which a determination could be made of the agency's jurisdiction; and if they established that jurisdiction did in fact exist, then respondent would be required to produce the other documents which the subpoena required.

Or the rule might be that the subpoena will be enforced, despite the denial of jurisdiction, if the agency certifies that it has reasonable ground to believe that the necessary jurisdictional facts are present. If this view were adopted, should respondent be entitled to a hearing on the issue as to whether such reasonable belief exists? See *Securities & Exchange Commission v. Tung Corp. of America* (D. C. Ill., 1940), 32 F.

Supp. 371; and dictum in *Myers v. Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 49, 82 L. Ed. 638, 58 S. Ct. 459 (1938).

The conflict of decisions is discussed in 41 Mich. L. Rev. 959 (1943). Many cases are collected in an annotation in 27 A. L. R. (2d) 1208.

*Relevancy.* Who has the burden of showing relevancy? Must the agency demonstrate that the documents would contain relevant information? How could an agency do this until it obtained the documents? Must respondent demonstrate that nothing in the documents would be relevant to the agency's inquiry? How could respondent do so without revealing the contents of the documents? Should the court take the position that the subpoena will be enforced unless it clearly appears that the documents are not potentially relevant?

In *National Labor Relations Board v. Pesante* (D. C. Calif., 1954), 119 F. Supp. 444, the National Labor Relations Board, in the course of a proceeding to determine an appropriate bargaining unit, subpoenaed certain records of thirty retail furniture stores. Only three of the thirty stores were parties to the proceeding before the agency. The stores were located in 26 different communities, up to 400 miles distant from the place where the evidence was to be produced. The court refused to enforce the subpoena.

In *National Labor Relations Board v. New England Transp. Co.* (D. C. Conn., 1936) 14 F. Supp. 497, the Board subpoenaed a list of Respondent's entire personnel. This was held proper, since it would assist the Board in classifying employees, even though the Board had no direct interest in many of the names.

In *United States v. Union Trust Co. of Pittsburgh* (D. C. Penn., 1936), 13 F. Supp. 286, the Bureau of Internal Revenue, seeking to prove that certain sales were merely "wash" sales, made to evade taxes, subpoenaed all the minutes of respondent's directors' meetings for a period of two years. It was held that the demand was too broad, and unenforceable.

It is required not only that the documents sought must be relevant, but that they must be appropriately described. However, the courts are liberal in their attitude toward this phase of the matter, recognizing, no doubt, the difficulty of specifying with great particularity the desired documents. The decision in *Brown v. United States*, 276 U. S. 134, 72 L. Ed. 500, 48 S. Ct. 288 (1928) illustrates this liberality. There the subpoena served on Mr. Brown, so it was contended, "failed to show that the documents described were important or material; that it was a blanket command to produce all letters or copies of letters and telegrams sent to or received from a large number, to-wit, 192 persons during a period of more than three years, and called for many documents obviously harmless and of no evidentiary value; and that said subpoena was not a bona fide attempt to obtain evidence, but constituted a fishing expedition, undertaken without knowledge whether or not he had in his

possession evidence desired by the United States or the grand jury, but undertaken in the hope that evidence might be discovered which could be used against him on trial of the pending indictment or under a new one."

The subpoena, by its language, called for the production of "all letters or copies of letters, telegrams, or copies of telegrams, incoming and outgoing, passing between the National Alliance of Furniture Manufacturers and its predecessor, the National Alliance of Case Goods Associations, their officers and agents, and the several members of said National Alliance of Furniture Manufacturers and its predecessor, the National Alliance of Case Goods Associations (including corporation, partnerships, and individuals, and their respective officers and agents), during the period from January 1, 1922, to June 15, 1925, relating to the manufacture and sale of case goods, and particularly with reference to—

- "(a) General meetings of Alliance;
- "(b) Zone meetings of Alliance members;
- "(c) Costs of manufacture;
- "(d) Grading of various types of case goods;
- "(e) Issuing new price lists;
- "(f) Discounts allowed on price lists;
- "(g) Exchanging price lists;
- "(h) Maintaining prices;
- "(i) Advancing prices;
- "(j) Reducing prices;
- "(k) Rumors of charges of price cutting;
- "(l) Discounts, terms and conditions of sale, etc.;
- "(m) Curtailment of production;
- "(n) The pricing of certain articles or suits of furniture by W. H. Coye;
- "(o) Cost bulletins;
- "(p) Intention of W. H. Coye and A. C. Brown to attend furniture markets or expositions at Jamestown, N. Y., Grand Rapids, Mich., Chicago, Ill. and New York City, N. Y., and meetings of members held prior to and during said furniture markets or expositions;
- "(q) Conditions obtaining at various furniture markets or expositions at Jamestown, N. Y., Grand Rapids, Mich., Chicago, Ill. and New York City, N. Y.,
- "(r) Manufacturers maintaining a fair margin of profit between cost prices and selling prices."

The court upheld the subpoena and said in part:

"In *Hale v. Henkel*, 201 U. S. 43, 26 S. Ct. 370, 50 L. Ed. 652, here cited in support of Brown's second contention, this court held that a subpoena *duces tecum* requiring a witness to produce all understandings, contracts and correspondence between a corporation named and six different companies, as well as all reports made and accounts rendered by

them from the date of the organization of the corporation, and all letters received by the corporation since its organization from more than a dozen different companies, was too sweeping to be regarded as reasonable. The limitation in respect of time embraced the entire period of the corporation's existence and there was no specification in respect to subject matter, and this court said that, if the return had required the production of all the books, papers, and documents found in the office of the corporation, it would scarcely be more universal in its operation, or more completely put a stop to the business of the company. The subpoena here under consideration is very different. It specifies a reasonable period of time, and with reasonable particularity the subjects to which the documents called for relate. The question is ruled, not by *Hale v. Henkel*, but by *Consolidated Rendering Co. v. Vermont*, 207 U. S. 541, 553, 554, 28 S. Ct. 178, 52 L. Ed. 327, 12 Ann. Cas. 658, and *Wheeler v. United States*, 226 U. S. 478, 482, 483, 489, 33 S. Ct. 158, 57 L. Ed. 309."

*Unduly Oppressive.* Ordinarily, an administrative subpoena will not be enforced where it seeks to compel production of information which would be privileged in ordinary judicial proceedings. *United States v. Louisville & N. R. Co.*, 236 U. S. 318, 59 L. Ed. 598, 35 S. Ct. 363 (1915). Can an agency compel disclosure of confidential information by adopting elaborate record-keeping regulations, and then requiring production of the records? See *Shapiro v. United States*, 335 U. S. 1, 92 L. Ed. 1787, 68 S. Ct. 1375 (1948).

Obviously, whether a demand is "unduly oppressive" ordinarily depends upon an appraisal of the entire factual situation in a particular case. Should a subpoena be enforced, despite the fact that the information requested is deemed a "trade secret"? Should courts enforce a demand that a respondent whose place of business is in California produce a large volume of documentary information at a hearing to be held in Washington, D. C.? If respondent shows that production of all the documents requested would leave its office staff without the use of the books of account used in its daily business operations, should that be deemed to make the request unduly oppressive? If the subpoena requests respondent to tabulate certain information, and it appears that it would cost upwards of \$1,000 to make the requested tabulation, should the subpoena be enforced? These and many related questions afford the basis for considerable litigation. See, e. g., *Goodyear Tire & Rubber Co. v. National Labor Relations Board* (CCA 6th, 1941), 122 F. (2d) 450; *Smith v. Porter* (CCA 9th, 1946), 158 F. (2d) 372; *Bank of America Nat. Trust & Savings Ass'n v. Douglas* (App. D. C., 1939), 105 F. (2d) 100.

Sec. 6 (b) of the Federal Administrative Procedure Act, 60 Stat. 240, relates to the issuance and enforcement of agency subpoenas. Following is an excerpt from the Report of the Committee on Judiciary of the House of Representatives, with reference to this section:

H. Rep. No. 1980, 79th Cong., 2nd Sess. (1946) 32-3.

This section is designed to preclude "fishing expeditions" and investigations beyond jurisdiction or authority. It applies to any demand, whether or not a formal subpoena is actually issued. It includes demands or requests to inspect or for the submission of reports. An investigation must be substantially and demonstrably necessary to agency operation, conducted through authorized and official representatives, and confined to the legal and factual sphere of the agency as provided by law. Investigations may not disturb or disrupt personal privacy, or unreasonably interfere with private occupation or enterprise. They should be conducted so as to interfere in the least degree compatible with adequate law enforcement.

"Nonpublic investigatory proceeding" means those of the grand jury kind in which evidence is taken behind closed doors. The limitation, for good cause, to inspection of the official transcript may be properly invoked by an agency where evidence is taken in a case in which prosecutions may be brought later and it would nullify the execution of the laws to permit copies to be circulated. In those cases the "good cause" should be clear and convincing; then the witness or his counsel may be limited to inspection of the relevant portions of the transcript. Parties should in any case have copies or an opportunity for inspection in order to assure that their evidence is correctly set forth, to refresh their memories in the case of stale proceedings, and to enable them to be advised by counsel. They should also have such copies whenever needed in other judicial or administrative proceedings.

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Sometimes an agency, fearing that a subpoena directed to a respondent would be strenuously resisted, seeks to subpoena copies of the desired documents which are in the hands of a more or less disinterested third party. For example, it may seek to subpoena the records of a bank or stockbroker revealing the financial dealings of a customer, or a telegraph company's copies of messages sent over its wires. In such case, should respondent be afforded a derivative right to assert any objections that could be raised, had the subpoena been addressed directly to it? In this connection, see: *Hearst v. Black* (App. D. C., 1936), 87 F. (2d) 68; *Newfield v. Ryan* (CCA 5th, 1937), 91 F. (2d) 700; *Zimmerman v. Wilson* (CCA 3rd, 1939), 105 F. (2d) 583; *McMann v. Securities & Exchange Commission* (CCA 2nd, 1937), 87 F. (2d) 377; *United States v. First Nat. Bank of Mobile* (D. C. Ala., 1924), 295 F. 142.

#### **Right of Respondent to Subpoena**

**Brinkley v. Hassig, Supreme Court of Kansas, 1930. 130 Kan. 874, 289 Pac. 64.**

The opinion of the court was delivered by

BURCH, J. The action was one by plaintiff to enjoin the state board of medical examination and registration from holding a hearing on the



subject of revocation of plaintiff's license to practice medicine and surgery. A demurrer to the petition was sustained, and plaintiff appeals.

The board of medical examination and registration consists of seven members appointed by the governor by and with the consent of the senate. Each member must be a physician in good standing in his profession, who received a degree of doctor of medicine from a reputable college or university not less than six years previous to appointment as a member of the board. Each member is required to take and subscribe the oath prescribed for state officers, and the oath is filed with the secretary of state. The board is organized by selection of a member as president and another member as secretary, and is required to hold regular meetings on stated days of the year in such of the chief cities of the state as the board may designate. The board has a common seal, and has power to formulate rules to govern its action. The president and secretary have power to administer oaths pertaining to all matters relating to the board's business. The board is required to keep a record of its proceedings and a register of applicants for license, and the books and register of the board are *prima facie* evidence of all matters recorded thereon. (R. S. Supp. 74-1001.)

All persons intending to practice medicine or surgery are required to apply to the board for license to practice. The application must be in writing, and must be accompanied with proof of moral character and satisfactory evidence of study for a prescribed time. All applicants must submit to an examination of a character to test qualification to practice medicine and surgery, except that graduates of certain medical institutions and holders of licenses from other states whose standards are as high as those of this state, may, in the discretion of the board, be admitted without examination. The statute further provides as follows:

"The board may refuse to grant a certificate to any person guilty of felony or gross immorality or addicted to the liquor or drug habit to such a degree as to render him unfit to practice medicine or surgery, and may, after notice and hearing, revoke the certificate for like cause, or for malpractice, or unprofessional conduct." (R. S. Supp. 65-1001.)

In the year 1916 the plaintiff, John Richard Brinkley, of Milford, Kan., was granted a license to practice medicine and surgery in Kansas, under the reciprocity provision of the law, and the license is still in effect. On April 28, 1930, a verified complaint was filed with the board, stating causes for revocation of the license. On April 29 the licensee was served with notice, signed by the president and secretary and under seal of the board, that the complaint had been filed, and that a hearing would be had on the complaint at a specified place in Topeka on June 17, 1930, at 2 p. m., which is the date of a regular meeting of the board.

The notice informed the licensee he might appear before the board at the hearing, present his defense to the charges contained in the complaint, and be represented by counsel if he so desired. A copy of the complaint was attached to the notice. On May 7, 1930, this action was commenced, to prevent the board from holding any hearing to determine the truth of the charges contained in the complaint.

The petition did not allege that the statute was lame in regard to specifying grounds for revocation of license, and it was not. Neither did the petition allege that the complaint did not state grounds for revocation of license prescribed by the statute. The complaint was by no means confined to challenge of the success of the licensee's gland operation, the claimed result of which is that dotards having desire without capability may cease to sorrow as do those without hope, and the complaint was not that the licensee is a quack of the common, vulgar type. Considered as a whole, the gravamen of the complaint is that, being an empiric without moral sense, and having acted according to the ethical standards of an imposter, the licensee has perfected and organized charlatanism until it is capable of preying on human weakness, ignorance and credulity to an extent quite beyond the invention of the humble mountebank who has heretofore practiced his pretensions under the guise of practicing medicine and surgery. The petition for injunction denied the charges contained in the complaint, but the ground for injunction was, the board has no power to hold a hearing to find out whether the charges are true or false. . . .

The specific allegations are that the statute does not authorize the board to issue subpoenas for witnesses, or to enforce the attendance of witnesses, or to compel production of books, documents and records; and that there is no provision in the law for taking depositions to be used at the hearing. These allegations are true, and because the proceedings before the board are not judicial, the enumerated aids to judicial action may not be implied. Plaintiff's supposed plight, in view of the omissions from the statute, is described in the petition.

The injunction was properly denied because plaintiff's petition did not name any witness residing in the United States, or any European savant, whom he desires to examine; did not state what testimony any witness would give relative to any charge contained in the complaint; and did not specify any book, document or record pertaining to the inquiry by the board which plaintiff wishes produced. We have here a complaint that, by virtue of a license obtained by fraud, the imposter holding it is fleecing the defective, the ailing, the gullible, and the chronic medicine takers who are moved by suggestion, and is scandalizing the medical profession and exposing it to contempt and ridicule. The board has power to conduct a hearing regarding this matter,

and the court was not obliged to stay the hand of the board without some statement of what somebody would say tending to clear the license holder of the charges preferred against him. The judgment will not be affirmed, however, on that ground. The court holds the statute does not violate either the Constitution of the United States or the Constitution of the state of Kansas.

Plaintiff's contentions are based on certain fundamental postulates. One is that right to keep his license is a property right. What he has is a privilege of value to him, but there is no need to tarry over definitions. So far as this court knows, Doctor Brinkley may be a practitioner having the highest professional and ethical ideals. He may be a pioneer in advance of the medical and surgical science of his time. He may be a benefactor of mankind, and entitled to overflowing reward for his services. All the court has before it is the complaint of the board and the petition for injunction. No presumption of either guilt or innocence may be indulged. The complaint in effect states that in early days of Doctor Brinkley's practice in this state he was a convicted bootlegger, and roamed from state to state for license to practice. The petition states that he has expended a quarter of a million dollars in establishing and equipping his hospital at Milford. It will be assumed his interest in keeping a license, by virtue of which he may continue his thriving business, is an important matter to him, and the court holds he cannot be deprived of his license without due process of law.

Another fundamental assumption of plaintiff is that the word "hearing" as used in the statute means "trial." A trial is a judicial examination of issues, whether of law or fact, in an action (R. S. 60-2901), and an action is an ordinary proceeding in a court (R. S. 60-104). If the legislature had intended that a proceeding to revoke a physician's license should take the form of a trial, presumably the statute would have so declared. The board is not a judicial tribunal, performs no judicial function, such boards never have been classed with judicial tribunals, and due process of law does not require a trial. The court disposed of this subject in the case of Meffert v. Medical Board, 66 Kan. 710, 72 Pac. 247.

Recognizing the conclusiveness of the decision in the Meffert case, plaintiff protests he does not claim the board is a court, and does not claim the board is clothed with judicial power; but after the disclaimer, plaintiff proceeds to argue the board is a cipher unless it has enumerated attributes of a judicial tribunal, and not only that, but the attributes of a judicial tribunal acting under the constitutional guaranty relating to prosecution for crime.

"In all prosecutions, the accused shall be allowed to appear and defend in person, or by counsel; to demand the nature and cause of the accusation against him; to meet the witness face to face, and to

have compulsory process to compel the attendance of witnesses in his behalf, . . .” (Bill of Rights, Kansas Constitution, § 10.)

In the Meffert case it was expressly held a proceeding to revoke a physician's license is not criminal in its nature, and the purpose is not punishment of the delinquent. The purpose is to protect and promote the public welfare by excluding from the profession those licensees who will not or cannot measure up to the prescribed standards of professional probity.

The board is an administrative body created under the police power of the state. A constitutional framework and a body of laws will not alone make government work; and in this country, as well as in England (see “The Task of Administrative Law,” by Felix Frankfurter, 75 U. of Pa. Law Rev. 614 [1927]), the increasing complexity of modern life cause the law to develop along a path called administrative law. . . .

Over and over again the Supreme Court of the United States has declared that in administrative proceedings due process does not require particular form or method of procedure, but that its requirements are satisfied if the person affected by the proceeding has reasonable notice and reasonable opportunity to be heard and to present his defense, due regard being had to the nature of the proceedings and the character of the rights which may be affected. A recent declaration to this effect may be found in the opinion of MR. JUSTICE STONE in the case of Hurwitz v. North, 271 U. S. 40 (1926), which involved due process of law in the revocation of a physician's license under the law of Missouri. . . .

In the case of Hurwitz v. North, 271 U. S. 40, the statute under consideration did not authorize the medical board to issue subpoenas. It did authorize the taking of depositions of witnesses who did not voluntarily appear, before officers empowered to compel attendance and the giving of testimony. Depositions when taken might be read before the board. It was held the procedure gave ample opportunity to make defense. There was no intimation that omission of the provision relating to taking depositions with the incident of compulsory process would have impaired the law. In a comment on the decision, Dr. Ernst Freund, an eminent authority on due process, raised the question whether the decision might not confuse the law, because a decision sustaining a statute by reason of nonexistence of alleged defects does not require the same consideration as if defects existed and the court were obliged to declare the effect on the statute. This court is of the opinion that if confusion results, it will not be because of the decision itself; but the following portions of the comment are pertinent here:

“A saving circumstance will, however, be found in the rule, so far as it is recognized, that a person cannot rely upon a constitutional defect by which he is not prejudiced. In a revocation proceeding it will

be rare indeed that the person charged has to rely for his defense upon the testimony of unwilling witnesses; normally it is the testimony on behalf of the state that may stand in need of compulsory process, and if it does, the case for the state will be apt to be weak. Except in cases of investigations, it is the opportunity to be heard and to hear the evidence on the other side, not the right to compulsory testimony, that counts in administrative proceedings." (21 Ill. Law Rev. 493 [1927].)

A person contending for American citizenship and all that American citizenship may mean, against a deportation order, is not deprived of due process of law because he may not have compulsory process for witnesses in his behalf. (*Low Wah Suey v. Backus*, 225 U. S. 460.) The private interest involved in exclusion of an undesirable from practice of medicine and surgery is not so different in kind that opportunity to hear and to be heard must be supplemented by compulsory process.

In discussing proceedings for exclusion from practice of a profession, great emphasis is usually placed on the private interest rather than on the public interest, and much judicial sympathy has been expended because of the humiliation and shame a professional man must feel if his license be revoked. If charges of the kind contained in the complaint to the board should be established against one professing to be a physician and surgeon, his emotions would probably be of the same refined quality as the emotions of a dance-hall keeper whose place is summarily closed because he was running it for assignation purposes, or the emotions of one against whom the postmaster general issues a fraud order on evidence satisfactory to himself of misuse of the mail service.

The statute under consideration is a public welfare statute. It was made for action, and not merely to furnish grist for the judicial mill. While a full and fair hearing is mandatory, the character of hearing is not measured by standards of judicial procedure, and the licensee may present the testimony of his voluntary witnesses, so far as he desires to do so, by affidavit made before and duly authenticated by any officer authorized to take depositions. The requirement of hearing makes it incumbent on the board to receive such testimony and give it the same consideration it would have if taken by deposition without appearance of the adverse party. . . .

The court is of the opinion the statute is not rendered nugatory by the fact that the Legislature did not provide compulsory process for the factitious case in which successful defense might depend on testimony of unwilling, hostile and prejudiced witnesses not produced by the complainant for cross-examination at the hearing.

It may be necessary for the board to receive affidavits in support of the complaint. Witnesses should be produced for cross-examination if it be practicable to do so, but if it should become necessary to re-

sort to affidavits, due process requires that the licensee should be afforded opportunity to inspect them and to procure counter testimony. If affidavits should be used in support of the complaint, reason for non-attendance of the witnesses should appear, so that in case of judicial review the fairness of the proceeding may be disclosed by the board's record.

The court is of the opinion that when the statute is interpreted in the manner indicated, it does not deprive a licensee against whom complaint is made of due process of law, and the judgment of the District Court is affirmed.<sup>7</sup>

**Inland Steel Co. v. National Labor Relations Board, Circuit Court of Appeals, Seventh Circuit, 1940. 109 F. (2d) 9.**

[In this case, the court held that on the basis of numerous acts of injudicious behavior on the part of the Trial Examiner, there had been a denial of a fair trial. A longer excerpt from the decision appears in Chapter V, *infra*.]

MAJOR, Circuit Judge.

Another ground upon which petitioner argues it was deprived of a full and fair hearing is that it was denied the privilege of ordinary witness subpoenas. At the outset of the hearing, the Trial Examiner ruled that such subpoenas would be issued to petitioner only upon written application containing specifications of "the name of the witness and the nature of the facts to be proved." The Board takes the position that this ruling of the Examiner was in compliance with Article II, Section 21 of the Rules and Regulations of the Board. Petitioner's position is that this rule, when fairly construed, has application only to subpoenas duces tecum and not ordinary subpoenas. We do not think the rule is susceptible of such construction—in fact, it plainly reads otherwise. The Board also argues that the rule does not apply to it because it is not a party to the proceedings. We do not think it is necessary for us to determine whether or not this position is sound. The fact is, the rule was not applied to counsel for the Board and, therefore, he was not required to file such application. When petitioner raised the question early in the hearing, counsel for the Board stated: "That the rules and regulations do not provide that the Board must apply to itself for subpoenas; that to construe the rules in that manner would be ridiculous; and that for both of those reasons the practice is that the Board does not apply to itself for subpoenas."

Assuming that counsel for the Board correctly appraised the situation, and we think it did, it discloses the unfairness of the procedure employed. It also illustrates, in a minor fashion, what this record, as a

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<sup>7</sup> Appeal dismissed, 282 U. S. 800, 75 L. Ed. 719, 51 S. Ct. 39 (1930).

whole, convincingly discloses—that is, the danger of imposing upon a single agency the multiple duties of prosecutor, judge, jury and executioner. The further assumption that the ruling of the Trial Examiner was in compliance with the Board's rule, does not improve the situation—it merely shows the rule itself is unfair and discriminatory.

Under the procedure followed, petitioner was required to make application for subpoenas, not to the Examiner or a Regional Director, but to the Board or a member thereof in Washington, specifying the "name of the witness and the nature of the facts to be proved by him." How the Board in Washington, or a member thereof, could be in a position to determine the materiality of "the nature of the facts to be proved," especially where the issues were as numerous and complicated as they were in the instant case, it is difficult to understand. Waiving aside this thought, however, a burden was placed upon one side which did not exist as to the other in the matter of obtaining witnesses. The situation may be aptly stated thus: Petitioner, in order to obtain a subpoena, was required to present to its opponent an application therefor with notice as to what it expected to prove by the witness desired to be subpoenaed. Thus, it was within the discretion of the Board (the prosecutor, if not a party) to determine when process should issue in favor of the one to be condemned.

The Board argues that due process of law does not require the right to unqualified process, but that such right is amenable to reasonable regulations. Rev. St. Sections 876, 28 USCA § 654, and § 878, 28 USCA § 656, are cited in support of this argument. The former has to do with subpoenas in civil cases for witnesses living out of the District and at a distance of more than 100 miles from the place of trial. The issuance of process in such cases is within the discretion of the court. There, however, the court is not a party to the litigation and the requirement of the statute is equally applicable to both sides. The latter provision refers to indigent defendants and is not a limitation upon his right of process, but merely places in the court the discretion of allowing such process before the expenses incurred in connection therewith can be charged to the Government. Neither of these sections affords any support to the reasonableness of the instant regulation.

It is further argued by the Board that petitioner's complaint is without merit because there is no showing that evidence favorable to it was excluded. This argument begs the question. We are not now considering the extent to which petitioner was prejudiced, but whether it was, by such procedure, deprived of a substantial right, or whether the procedure employed placed it at a disadvantage in contrast with its opponent. It is also argued that the rule is reasonable because petitioner, under Section 10 (e) of the Act, has a right to make application to this court to adduce additional evidence. This argument

also is not tenable. Such provision has no bearing upon what we regard as an unreasonable and unfair restriction upon petitioner's right to the process of subpoena.<sup>8</sup>

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**Coney Island Dairy Products Corp. v. Baldwin, New York Supreme Court, Appellate Division, 1935. 243 App. Div. 178, 276 N. Y. Supp. 682.**

HILL, Presiding Justice. The license under which petitioner operated as a milk dealer has been revoked by the Division of Milk Control, Department of Agriculture and Markets. We are reviewing this determination under an order of certiorari.

From the return, petitioner appears to have violated a necessary and salutary rule of the department, but the determination should be annulled for the refusal by the commissioner to furnish subpoenas to the petitioner to permit the summoning of witnesses in its behalf. This refusal was the subject of a separate memorandum by the Director of the Division of Milk Control. It states: "Counsel for the applicant asked to be supplied with at least twenty subpoenas, declining to state whom he wished to subpoena, the character of the testimony, or the exact nature of the testimony to be presented."

. . .

The result of the decision by the Division of Milk Control in this case will destroy a business in which more than 8,000 quarts of milk are sold daily, and render substantially valueless \$60,000 of property, as used milk bottles, delivery trucks, and plant paraphernalia have little value except for use in a going business. No matter how benevolent the intentions of those in charge of a governmental bureau, their great powers should be exercised only after alleged offenders have had a full hearing with all the safeguards incident to due process.

The privilege of a litigant to enforce the attendance of witnesses is an ancient right and should not be denied by prejudging the materiality

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<sup>8</sup> In the principal case, the court relied on the cumulative effect of a large number of improper acts, in holding there had been a denial of a fair trial. In other cases, courts have held that the mere imposition of discriminatory conditions respecting the issuance of subpoenas was not enough to invalidate administrative action, in the absence of a showing of actual prejudice. See, e. g., *North Whittier Heights Citrus Ass'n v. National Labor Relations Board*, (CCA 9th, 1940), 109 F. (2d) 76; *National Labor Relations Board v. Blackstone Mfg. Co., Inc.* (CCA 2nd, 1941), 123 F. (2d) 633; *National Labor Relations Board v. Dahlstrom Metallic Door Co.* (CCA 2nd, 1940), 112 F. (2d) 756.

Should it be required that respondent establish that it was harmed; or should the rule be that (since actual prejudice may be suffered in cases where its existence is not susceptible to precise demonstration) the burden is on the agency to prove lack of prejudice?



of the testimony which may be given. Sections 2194, 2195, Wigmore on Evidence (1st Ed.) 1904, Little, Brown & Co. "Nor is it the question whether parties shall be licensed to cause inconvenience to their neighbors by summoning promiscuously a horde of unnecessary witnesses without risk or hindrance; that abuse can be guarded against by penalties for parties who are found by the court to have summoned witnesses with wanton superfluity." Section 2201, Wigmore on Evidence. It is the function of the trial court to determine admissibility when evidence is offered. It may not be prejudged by withholding a subpoena for the witness. *Friedeberg v. Haffen*, 162 App. Div. 79, 147 N. Y. S. 1.

The issuance of a subpoena for a witness during the progress of a cause at the request of a party is a matter of right and not a matter where the discretion of a judge or clerk may be exercised. *Edmondson v. State*, 43 Tex. 230. According to Wigmore, the statutory origin of the right to subpoena witnesses is found in "the notable statute of Elizabeth in 1562-3." St. 5 Eliz., c. 9, § 12. The same author states concerning the right of a party to call witnesses and have the benefit of their testimony: "It is to be remembered that the demand comes, not from any one person or set of persons, but from the community as a whole,—from justice as an institution, and from law and order as indispensable elements of civilized life." Section 2192, Wig. Ev. With a genesis so early and the necessity so graphically and urgently stated by a recognized authority, the right to subpoena witnesses should not be curtailed without explicit legislative direction.

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### Statutory Provisions

To avoid the unnecessary difficulties that attend agency practices of the sort involved in the two preceding cases, legislatures have considered various types of statutory provisions intended to make agency subpoenas as readily available to counsel for respondent as to counsel representing the agency.

Does the language of Sec. 6 (c) of the Federal Administrative Procedure Act accomplish this result? (In considering this question, examine the language of Sec. 12.) The Hoover Commission Task Force on Legal Services and Procedures recommended an amendment which would read in part: "Subpoenas shall be issued upon request without discrimination as between parties, public or private."

The Labor-Management Relations Act, 1947, 61 Stat. 136, 29 USCA § 161 (1), provides that the National Labor Relations Board "shall upon application of any party . . . forthwith issue to such party subpoenas requiring the attendance and testimony of witnesses or the production of any evidence . . ."

**United States v. Schneiderman, United States District Court, S. D. California, 1952. 106 F. Supp. 731.**

MATHES, District Judge.

Defendants are on trial by jury under an indictment charging conspiracy, 18 U.S.C. § 371, to commit offenses against the United States prohibited by the Smith Act, 54 Stat. 670, Act June 28, 1940, 18 U.S.C. (1946 ed.) § 10, 18 U.S.C. (1948 ed.) § 2385, "by . . . organizing and helping to organize, as the Communist Party of the United States of America a . . . group of persons who advocate and teach the duty and necessity of overthrowing the Government of the United States by force and violence . . ."

One of the witnesses for the Government has testified on direct examination that he became a member of the Communist Party at Milwaukee, Wisconsin, where he engaged in various Communist Party activities and made written reports of such events to agents of the Federal Bureau of Investigation. Three of the reports relate to Communist Party gatherings concerning which the witness has testified in response to questions put by prosecution counsel. Defendants now move for an order directing the Government to produce these three reports for inspection and use by the defense upon cross-examination of the witness.

The United States Attorney opposes the motion to produce upon the ground that such documents "are to be regarded as confidential" by virtue of regulations designated as "Department of Justice Order No. 3229," issued by the Attorney General under authorization of 5 U. S. C. A. § 22 which provides in part that: "The head of each department is authorized to prescribe regulations, not inconsistent with law, for the government of his department . . . and the custody, use, and preservation of the records, papers, and property appertaining to it."

Exercising the discretion reserved to him in the regulations, the Attorney General, speaking through the United States Attorney at bar, takes the position that the Government cannot be required to produce for use by the defense "confidential" documents such as the three reports in question here.

It is urged in support of the pending motion that, notwithstanding the regulations of the Attorney General, defendants are entitled as of right to inspect the "F. B. I. reports" under authority of *Bowman Dairy Co. v. United States*, 1951, 341 U. S. 214, 71 S. Ct. 675, 95 L. Ed. 879. On the other side the Attorney General contends that he is entitled as of right to withhold production and inspection and use of the reports under authority of the regulations.

In my opinion neither contention is sound. The matter is one which *ex necessitate* must rest within the discretion of the trial court. . . .

If a document material to the defense is of such a nature that the confidential information which it contains may be excised or by other means withheld from public disclosure without impairing the evidentiary value of the writing, the trial court will exercise discretionary powers to the end that the competing interests of both Government and defense may be satisfied. See *United States v. Burr*, C. C. Va., 1807, 25 Fed. Cas. 187, 190-193, No. 14694.

Where, however, the nature of the document or the character of its contents is such that the confidential information therein contained cannot fairly be withheld without diminishing the possible evidentiary value of the writing to the defense, then the court must determine in the exercise of discretion whether, notwithstanding the confidential information, the accused should be permitted to compel production of the document for use as evidence on behalf of the defense.

Proper exercise of judicial discretion in determining whether to compel production requires in every case that any public policy militating against public disclosure of the document be weighed against the interest of the accused in having the document for use in making a defense to the charge. See *Langnes v. Green*, 1931, 282 U. S. 531, 541, 51 S. Ct. 243, 75 L. Ed. 520. This involves a balancing of the inconvenience of public disclosure against the inconvenience of making a defense without the document. Cf. *Shores v. United States*, supra, 8 Cir., 174 F.2d at pages 844-845. The latter factor is to be measured largely by an appraisal of the probative or evidentiary value of the document—what possible use the defense could make of it for impeachment or other evidentiary purposes.

If the possible evidentiary value of a document to the defense is clearly negligible, the trial court might well be prompted to hold that the interest of the accused in the use of the writing as evidence is outweighed by some public policy, such as that which favors protection from disclosure of the identity of an informer to law enforcement officials, cf. *Scher v. United States*, 1938, 305 U. S. 251, 59 S. Ct. 174, 83 L. Ed. 151, or that which favors protection of information affecting national security, cf. *Zimmerman v. Poindexter*, D. C. Hawaii, 74 F. Supp. 933, and other "secrets of State." See 8 Wigmore, Evidence, §§ 2367-2378a (3d. ed. 1940).

If, on the other hand, the possible evidentiary value is such that use of the document may fairly be considered "essential to the defense," the Government should be compelled to produce it.

[The court concluded, in view of the circumstances of the case and particularly the fact that a criminal prosecution was involved, to grant the motion to compel production of the reports.]

### Subpoenas Directed to Agency

Many questions arise where counsel for respondent wishes to obtain information from the files of an agency which respondent believes would be helpful to its case but which the agency, for practical reasons, does not wish to disclose.

The principal problem, as suggested by *United States v. Schneiderman*, concerns the power of an agency to foreclose all inquiry by adopting a regulation prohibiting disclosure of its files and records. Many aspects of this troublesome question are discussed in annotations appearing at 95 United States Supreme Court Reports, Lawyers' Edition, p. 425, supplemented in 97 L. Ed. 735.

For a general discussion, see Pike and Fischer, "Discovery Against Federal Administrative Agencies," 56 Harv. L. Rev. 1125 (1943).

### SECTION 3. EXAMINATION OF BOOKS AND RECORDS; INSPECTION OF PREMISES; REQUIRING REPORTS; PRESCRIBING UNIFORM ACCOUNTING SYSTEMS

#### Examination of Books and Records

##### Statutory Provisions.

Well implemented administrative tribunals possess sources of information and means of securing materials for decision not known to judicial tribunals. In addition to the subpoena, possessed of course by the courts, the administrative body is usually equipped with power to inspect and copy books, records, documents, etc., belonging to persons or corporations within its jurisdiction; it is authorized, acting either in person or through agents, to inspect the premises on which the business under regulation is being conducted; it is empowered to call for reports, both annual and special; and in appropriate cases it may prescribe the form and content of the books of account of business enterprises.

The provisions of the Interstate Commerce Act dealing with these matters are as follows:

Section 20. (1) The Commission is hereby authorized to require annual reports from all common carriers subject to the provisions of this Act, and from the owners of all railroads engaged in interstate commerce as defined in this Act; to prescribe the manner in which such reports shall be made; and to require from such carriers specific answers to all questions upon which the Commission may need information. Such annual reports shall show in detail the amount of capital stock issued, the amounts paid therefor, and the manner of payment for the same; the dividends paid, the surplus fund, if any, and the number of stockholders; the funded and floating debts and the interest paid thereon; the cost and value of the carrier's property, franchises, and equipments; the number of employees and the salaries paid each class;

the accidents to passengers, employees and other persons and the causes thereof; the amounts expended for improvements each year, how expended, and the character of such improvements; the earnings and receipts from each branch of business and from all sources; the operating and other expenses; the balances of profit and loss; and a complete exhibit of the financial operations of the carrier each year, including an annual balance sheet. Such reports shall also contain such information in relation to rates or regulations concerning fares or freights or agreements, arrangements, or contracts affecting the same as the Commission may require; and the Commission may, in its discretion, for the purpose of enabling it the better to carry out the purposes of this Act, prescribe a period of time within which all common carriers subject to the provisions of this Act shall have, as near as may be, a uniform system of accounts, and the manner in which such accounts shall be kept.

(2) . . . The Commission shall also have authority by general or special orders to require said carriers, or any of them, to file monthly reports of earnings and expenses, and to file periodical or special, or both periodical and special reports concerning any matters about which the Commission is authorized or required by this or any other law to inquire or to keep itself informed or which it is required to enforce;

(5) The Commission may, in its discretion, prescribe the forms of any and all accounts, records, and memoranda to be kept by carriers subject to the provisions of this Act, including the accounts, records and memoranda of the movement of traffic, as well as of the receipts and expenditures of moneys. The Commission shall, as soon as practicable, prescribe, for carriers subject to this Act, the classes of property for which depreciation charges may properly be included under operating expenses, and the percentages of depreciation which shall be charged with respect to each of such classes of property, classifying the carriers as it may deem proper for this purpose. The Commission may, when it deems necessary, modify the classes and percentages so prescribed. The carriers subject to this Act shall not charge to operating expenses any depreciation charges on classes of property other than those prescribed by the Commission, or charge with respect to any class of property a percentage of depreciation other than that prescribed therefor by the Commission. No such carrier shall in any case include in any form under its operating or other expenses any depreciation or other charge or expenditure included elsewhere as a depreciation charge or otherwise under its operating or other expenses. The Commission shall at all times have access to all accounts, records, and memoranda, including all documents, papers, and correspondence now or hereafter existing, and kept or required to be kept by carriers subject to this Act, and the provisions of this section respecting the preservation and destruction of books, papers, and documents shall apply thereto, and it shall be unlawful for such carriers to keep any other accounts, records, or memoranda than those prescribed or approved by the Commission, and it may employ special agents or examiners, who shall have authority under the order of the Commission to inspect and examine any and all accounts, records, and memoranda, including all documents, papers, and correspondence now or hereafter existing, and kept or required to be kept by such carriers. . . .

Further subsections of section 20 provide penalties for failure to keep accounts and records, for making false entries, and for the mutilation and destruction of books and records.

Section 19a of the Interstate Commerce Act, providing for the valuation of railway property, contains the following subsection:

"(e) Every common carrier subject to the provisions of this act shall furnish to the Commission or its agents from time to time and as the Commission may require maps, profiles, contracts, reports of engineers, and any other documents, records, and papers, or copies of any or all of the same, in aid of such investigation and determination of the value of the property of said common carrier, and shall grant to all agents of the Commission free access to its right-of-way, its property and its accounts, records, and memoranda whenever and wherever requested by any such duly authorized agent. . . ."<sup>9</sup>

### Commodities Exchange Legislation

#### Compulsory Investigatory Powers in Connection with the Commodities Exchange Legislation.

In order to determine the right of governmental agencies to secure by compulsory processes the information needed in connection with the performance of their non-judicial duties, it is apparently necessary to form an estimate of the comparative persuasiveness of the public need of the information on the one hand, and the private inconvenience, embarrassment, expense and financial loss on the other hand. Nowhere is this balance of interests more sharply defined than in connection with proceedings involving the various commodities exchanges of the country. In the following pages are set forth a brief statement of the conflicting interests present in this field of governmental regulation, the statutory provisions concerning them, and certain litigation which has arisen with respect thereto.

The first important federal act concerning commodities exchanges was the so-called "Futures Trading Act," 42 Stat. 187, effective August 24, 1921, c. 86. This act was held unconstitutional in *Hill v. Wallace*, 259 U. S. 44, 66 L. Ed. 822, 42 S. Ct. 453 (1922), on the ground that it was an attempt to make an unlawful use of the federal taxing power for the purpose of regulating not only interstate but also intrastate dealings in grain futures. Thereafter the Grain Futures Act of September 21, 1922, c. 369, 42 Stat. 998 (7 USCA 1) was enacted. This act was entitled "An Act for the Prevention and Removal of Obstructions and Burdens Upon Interstate Commerce in Grain by Regulating Transactions in

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<sup>9</sup> Do the self-incrimination clause of the Fifth Amendment and the corresponding clauses in state constitutions protect against self-incrimination one who might be incriminated as a result of the disclosures resulting from the examination of books and records by administrative officers? See *Adams v. New York*, 192 U. S. 585, 43 L. Ed. 575, 24 S. Ct. 372 (1904); *Gould v. United States*, 255 U. S. 298, 65 L. Ed. 647, 41 S. Ct. 261 (1921); *People v. Defore*, 242 N. Y. 13, 150 N. E. 585 (1926).

Grain Futures Exchanges, and Other Purposes." The act was limited to interstate dealings, and instead of making use of the taxing power it was enacted pursuant to power of Congress over interstate commerce. As such it was distinguished from the earlier act and was upheld in its general aspects. *Chicago Board of Trade v. Olsen*, 262 U. S. 1, 67 L. Ed. 839, 43 S. Ct. 470 (1923). The Grain Futures Act was itself amended by an act of June 15, 1936, and is now known as the Commodities Exchange Act. In its present form it includes not only exchanges dealing with grains but also with many other agricultural commodities. As above stated this legislation presents sharply the troublesome question of the scope of the inquisitorial powers of governmental agencies.

A knowledge of the details of the act will be helpful in understanding the regulatory mechanism involved and the need of inquisitorial powers. The constitutional validity of these inquisitorial powers has been questioned and decided in connection with the case of *Bartlett Frazier Co. v. Hyde*, post, p. 280.

### **Description of the Commodities Exchange Act.**

The important features of the act are as follows:

Section 2 defines interstate commerce and provides that any transaction in respect to any article shall be considered to be interstate commerce "if such article is part of that current of commerce usual in the commodity trade whereby commodities and commodity products and by-products thereof are sent from one state with the expectation that they will end their transit, after purchase, in another. . . . Articles normally in such current of commerce shall not be considered out of such commerce through resort being had to any means or device intended to remove transactions in respect thereto from the provisions of this chapter."

Section 3 recites the dangerous tendencies of commodity transactions calling for future delivery as commonly conducted on boards of trade, stating that such transactions "are affected with a national public interest; that such transactions are carried on in large volume by the public generally and by persons engaged in the business of buying and selling commodities and the products and by-products thereof in interstate commerce; that the prices involved in such transactions are generally quoted and disseminated through the United States and in foreign countries as a basis for determining the prices to the producer and the customer . . .; that such transactions are utilized by shippers, dealers, millers and others engaged in handling commodities and the products and by-products thereof in interstate commerce as a means of hedging themselves against possible loss through fluctuations in price, that the transactions and price of commodities on such boards of trade are susceptible to speculation, manipulation, and control, and sudden or unreasonable fluctuations in the prices thereof frequently occur as a result of such speculation, manipulations or control, which are detri-

mental to the producer or the consumer and the persons handling commodities and products and by-products thereof in interstate commerce; and that such fluctuations in prices are an obstruction to and a burden upon interstate commerce in commodities and the products and by-products thereof, and render regulation imperative for the protection of such commerce and the national public interest therein."

Section 4 forbids all persons to use the mails or other means of interstate communication in offering or accepting sales of commodities for the future delivery thereof, or for disseminating prices or quotations thereof, except where the contract is in writing and is made by or through a member of a board of trade designated by the Secretary of Agriculture as a "contract market." The section also prohibits a large number of specific dangerous practices, and gives the Commission the power, after hearing, to place specific limits upon the quantity of sales for future delivery.

Section 5 permits the Secretary to designate a board of trade as a contract market when and only when the following conditions are complied with: (a) The board must be located in a large cash market where cash prices can be readily ascertained, (b) the board must make provision for the filing by its members of such reports as may be required by the Secretary of Agriculture, showing details of all commodity transactions, and the board must further provide for the inspection by the Secretary of all the records of board members, (c) the board must prevent the dissemination by it or its members of false or inaccurate reports as to crop conditions affecting prices in interstate commerce, (d) the board must prevent price manipulation and cornering by its dealers, (e) the board must admit as a member the representative of any applying co-operative producers' association which has adequate financial responsibility and which is engaged in the cash commodity business. Provision is also made for the inspection of all the books and records of the contract market itself, its governing board and its commodities, and its delivery warehouses.

Section 6 provides that any board of trade desiring to be designated as a "contract market" shall apply for a license to the Secretary of Agriculture who shall grant the license upon a showing that the foregoing conditions have been and will be complied with. Furthermore, a commission consisting of the Secretary of Agriculture, the Secretary of Commerce and the Attorney General is authorized after due notice and hearing to suspend or revoke any license upon showing of non-compliance with the conditions. Provisions are made for appeal to the Circuit Court of Appeals if a license applied for is refused, or if one is suspended or revoked. The court is given power to affirm or set aside the order of the administrative authorities or to direct its modification, but no order may be set aside or modified unless it is shown by the board of trade that the order "is unsupported by the weight of the evidence or was issued without due notice and a reasonable



opportunity having been afforded for a hearing, or infringes the Constitution of the United States or is beyond the jurisdiction of the commission."

Section 6 also permits the Secretary of Agriculture, after notice and hearing, to exclude from all contract markets all persons violating any of the provisions of the act or any rules or regulations made pursuant to the requirements. An appeal to the Circuit Court of Appeals is provided. The decree of the Circuit Court of Appeals is made final in this as well as in revocation cases, except that review on certiorari may be had in both instances in the Supreme Court.

Section 6 further provides that the Secretary of Agriculture may issue "cease and desist" orders against any board of trade or employee thereof who violates any of the provisions of the act or any rules or regulations adopted thereunder. Violation of such orders is penalized by fine and imprisonment.

Section 8 provides that the Secretary of Agriculture may make such investigations as he deems necessary, both for the efficient execution of his duties under the act and also in order to provide information for the use of Congress. He may publish the results of his investigations if he deems them of interest to the public but he must not publish the business transactions of any one person, nor may he publish trade secrets, or names of customers, except in conjunction with reports of proceedings against persons found guilty of violating the law.

Section 13 provides penalties for violation of the act. See page 465, note 8, for the phraseology of this section and the objections which have been taken to it.

### **Causes Leading to Enactment of Commodities Exchange Legislation.**

Some of the conditions leading to the enactment of Commodity Exchange regulatory legislation are relevant to a proper appraisal of it and to a proper understanding of the legal questions raised by it. When the original Grain Futures Act was before the Congress the Senate Committee on Agriculture and Forestry after holding hearings reported to the Senate in part as follows:

"Every member of a grain exchange who testified before this committee acknowledged that there are at times excessive speculation and undesirable speculation in the futures market. Furthermore, it was brought out that a few big traders at times influence prices—manipulate the market—by the great volume of their operations. Also, it was shown that a continually fluctuating, and not a stable market is the desire of the speculators. Such a market is against the interests of the producer; he must have stable prices in order to market his crops to best advantage. A market without wide and frequent price fluctuations would greatly benefit the producer. The reason for this is that rapidly fluctuating prices can not be fully reflected in the prices paid

at country stations, so an additional margin must be allowed when buying in the country."

Witnesses testified before the Committee that only about one percent of sales for future delivery on the Chicago Board of Trade, the largest grain trading center in the country, resulted in actual deliveries. Many witnesses urged the absolute prohibition of such sales. On the other hand, many thought them useful partly because of the possibility of using them in hedging transactions to prevent losses because of fluctuations of price, and partly as tending to stabilize prices. It appeared that although dealers could not permanently depress prices by manipulation of grain futures, they could produce violent temporary fluctuations by their operations, and that such fluctuations invariably worked injustice to producers as well as to legitimate dealers.

### **Need of Inquisitorial Powers.**

With particular reference to the matter of keeping books and records, the inspection of them by the employees of the Department of Agriculture, and the publicity features of the act generally, the following excerpt from the government's brief in the Circuit Court of Appeals in the case of Bartlett Frazier Co. v. Hyde (opinion post, p. 280) is revealing:

"It was impossible, prior to the institution of the system of records and reports required by the Grain Futures Act, to ascertain which trades were 'hedges' and which 'speculative,' or to ascertain whether the speculative activities of a trader or traders were causing sharp fluctuations. A given trader might place large orders with a number of different houses and thus obtain virtual control of the supply without his operations becoming known. Short selling activities in disturbing proportions might be freely practiced without the fact becoming known.

"The Grain Futures Act, however, contemplated that information shall be kept available which can be utilized for distinguishing transactions originating with persons engaged in the cash grain business, and therefore presumably representing for the most part 'hedging,' and persons not so engaged, and therefore representing for the most part 'speculation.' The distinction between 'hedging' and 'speculation' is one well recognized within the grain trade. It is of fundamental significance from the public point of view, and is important in detecting price manipulation.

"In order to prevent the misuse of facilities of grain futures exchanges in ways which result or tend to result in sudden and unreasonable fluctuations in prices or in the cornering of grain, it is highly necessary that the supervising authority be fully informed as to the volume and type of transactions. It is perfectly plain that in order to detect a 'corner' in its incipency, sufficient information must be at hand in order to trace the activities of the trader or traders seeking the 'corner.'

'Corners,' of course, are extreme cases. The usual instances of artificial manipulation of prices for private gain do not reach the proportions of a 'corner,' or they may be on the 'short' side, but the illustration of a 'corner' simply makes vivid the importance of full information to detect unreasonable speculative activities. There is no known antidote for manipulation that does not depend upon current complete information about the activities of the manipulator.

"In point II, *infra*, [i. e., in counsel's brief] will be discussed the administrative application of the Act, the details of the requirements for regular reports, the manner in which the right of inspection is exercised, and the type of publications and the manner in which information is made public. Suffice it to say here that the provisions in Sections 4, 5 (b), and 8 of the Act for the keeping of complete records, making inspections, filing reports, and publishing in generalized form such results of investigations as seem appropriate embody the very essence of the Congressional plan to abolish manipulation.

"No prudent way has ever been devised to obtain information of speculative activities which did not involve in the first instance the keeping of full and complete records of these transactions. It would obviously hamstring the supervising authority if it did not have power to inspect such records quickly when subversive activities are suspected. By their very nature manipulatory activities are consummated quietly and quickly. If court process had to be resorted to every time manipulation were suspected, there are numerous ways in which the participants could evade detection. Perhaps responsibility could ultimately be placed and the offenders punished, but the primary object of this legislation is prevention and not punishment. Free and unlimited access to the records of these transactions by the proper authorities is the only means yet devised of detecting subversive activities while they are current.

"It would be enormously expensive and needlessly annoying to grain exchange members to have Governmental inspectors daily at their places of business. Filing reports is a convenient, effective, and economical way for conveying necessary information regularly to the supervisory authority. In lieu of daily inspections a system of reports is certainly preferable and can not be held to be unreasonable if the power of inspection is sustained.

"As for publication of the results of investigations, since one of the principal purposes of the Act was to inform Congress and the public as to the means by which prices are manipulated, the publication of such information in generalized form is certainly appropriate. Here is a business affected with a national public interest as to which there has long been a great deal of mystery in the public mind. If that business is to operate under what, in effect, is a public license, it is surely appropriate that the public, the lawmakers, and the administrators may know how it works. The only legitimate interest which the

exchange members have in the matter of publication is that their individual private business transactions and the trade secrets of customers be not disclosed. This interest of the exchange members is adequately protected by Section 8 of the Act, in which 'data and information which would separately disclose the business transactions of any person and trade secrets or names of customers' are excepted from the class of matters which may be published in the discretion of the Secretary of Agriculture."

**Bartlett Frazier Co. v. Hyde, Circuit Court of Appeals, Seventh Circuit, 1933. 65 F. (2d) 350.**

Suit by Bartlett Frazier Company against Arthur M. Hyde, Secretary of Agriculture, and others, wherein certain parties intervened. From a decree dismissing the bill, plaintiff and interveners appeal.

ALSCHULER, Circuit Judge. The appellants are Bartlett Frazier Company, grain dealers, who are members of and trading upon the Board of Trade of Chicago in cash grain and grains for future delivery, and the similarly situated interveners asking the same relief. The appellees are Arthur M. Hyde, who was Secretary of Agriculture, L. A. Fitz, who was Grain Exchange Supervisor at Chicago for the Department of Agriculture, and the Board of Trade of Chicago.

The suit was brought by Bartlett Frazier Company to enjoin the defendants from requiring the plaintiffs therein, and others similarly situated, to file certain reports relative to future trading transactions, and to subject to inspection their books and records as authorized by the Grain Futures Act of September 21, 1922 (7 USCA §§ 1-17), and the regulations thereunder of the Department of Agriculture, on the ground that the act, or some of its parts, is unconstitutional. . . .

The contentions of appellants, as stated in the summary of their brief, are: (1) The acts of the defendants, Hyde and Fitz, in searching the records and books of plaintiffs and requiring reports of their contents violate the Fourth Amendment to the Federal Constitution; (2) the (Grain Futures) act is unconstitutional in that no notice of hearing or opportunity to be heard is afforded by its terms; (3) the act is unconstitutional in that no provision is made for testing the validity of orders, regulations, or requirements of the act, except under harsh and confiscatory penalties; (4) the act is unconstitutional in that no review of the validity of orders, regulations, or demands is afforded by its terms; (5) the act is unconstitutional in that it contains no provision for suspension of orders or for supersedeas pending test of validity; (6) the penalty provisions of the act are invalid because the offenses are so indefinite.

The constitutionality of the Grain Futures Act as a whole was definitely declared by the Supreme Court in *Chicago Board of Trade v. Olsen*, 262 U. S. 1, 43 S. Ct. 470, 67 L. Ed. 839, and so those allegations

and assertions attacking the constitutionality of the act as a whole must here fail.

Appellants invoke the Fourth Amendment as a shield against the requirement that they subject their books and records to the inspection of the Department, and the making of the reports. The Amendment, which declares the right of the people to be secure in their persons and papers against unreasonable search, cannot be applied to regulations which require reports and disclosures in respect to a business which is affected with a public interest, so far as such disclosures may be reasonably necessary for the due protection of the public. Were it otherwise, railroads and public utilities generally could not be required to make reports or to subject their records to inspection by agents of the government. Indeed, where public interest requires it, the right of visitation and disclosure has been extended even to business not charged with a public interest, as witness the taxing power, where the requirement of income reports and the right to inspect private books and papers have been definitely upheld. *United States v. First National Bank of Mobile* (D. C.), 295 Fed. 142, affirmed 267 U. S. 576, 45 S. Ct. 231, 69 L. Ed. 796 (where further authority is cited). In the *Olsen Case* it was said: "The Board of Trade conducts a business which is affected with a public interest and is, therefore, subject to reasonable regulation in the public interest." Page 40 of 262 U. S., 43 S. Ct. 470, 478, 67 L. Ed. 839.

The contention that through the reports and inspections appellants' business secrets and customers are more likely to disclosure, with the consequent tendency to injure appellants, cannot prevail against the paramount public interest requiring this control for the efficient exercise of which the disclosures through reports and right of inspection are quite indispensable. The statute (section 8 [7 USCA § 12]) forbids the revealing by the Secretary and his assistants of individual trades and of customers; and the findings here, predicated on the evidence, show that in the decade of experience since the act became operative no instances appear where any such confidence has been violated, or where appellants, or any other traders on the Board, have suffered from any such cause. No such official misconduct appears from the evidence to have been threatened or to be imminent.

It is argued that, because under the law inspections may be made and reports required where there is no charge, suggestion, or intimation of conduct contrary to the law, the act is unreasonable and void. It does not appear that appellants were charged with, or were suspected of, any transgression of the law. Assuming that by the declared statutory purpose of preventing corners and speculation in grains the public interest is subserved, this purpose would be seriously embarrassed if the government were powerless to require the information without regard to whether traders such as appellants were suspected of, or charged with, breaking the law. Indeed, the very requirement of the information

would of itself have tendency to discourage the unlawful manipulations at which the act is aimed.

The suggestion that inspection of the books would cause disturbance among appellants' employees, and that certain of the required reports would incur considerable expense in their preparation, are too trivial to merit serious consideration when weighed against the wise public policy manifested by the act. It might here be stated that the evidence discloses but very few instances where there have been inspections. The general requirement is that the reports be made, and this, being the usual practice in the business, could not have tendency to demoralize the working force.

The contention that by requiring these reports and permitting these inspections without first giving opportunity to be heard is violative of the constitutional "due process" provision (Const. Amend. 5) does not appeal to us. The public interest with which this business is impressed, and the evils at which the legislation is directed, well justify the statutory provisions for inspection and reports without first requiring a hearing in each case, and a finding that there has been such conduct as gives reasonable ground for making the inspection or requiring the reports.

Without the unqualified duty to report and the untrammelled right of inspection, the efficacy of the act would be unduly restricted; and if these features transgressed the Constitution, it is not conceivable that the constitutionality of the act would have been upheld as it was in the Olsen case.<sup>10</sup>

Affirmed.

**Federal Trade Commission v. National Biscuit Co., District Court, S. D. New York, 1937. 18 F. Supp. 667.**

GODDARD, District Judge. The Federal Trade Commission on September 2, 1936, filed a petition praying for an alternative writ of mandamus commanding the respondent, the National Biscuit Company, to furnish and file with the Federal Trade Commission, the petitioner, certain information regarding its business. After notice to respondent and a hearing, the writ was issued on September 16, 1936. The writ commanded the National Biscuit Company to show cause why it should not furnish the Federal Trade Commission with the information called for in certain blank forms, schedules, and questionnaires which were attached to and made a part of the writ. On the return of the writ, the respondent filed its answer and objections to the petition with its reasons for refusing to furnish the information, and the Commission filed and served its objections to respondent's answer and objections in the form of a general demurrer.

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<sup>10</sup> Certiorari denied, *Bartlett Frazier Co. v. Wallace*, 290 U. S. 654, 78 L. Ed. 567, 54 S. Ct. 70 (1933).

It appears from the papers filed that the Federal Trade Commission bases its authority and demand for the information sought on a Resolution passed by both Houses of Congress and approved by the President on August 27, 1935 (Public Resolution No. 61, 74th Congress [49 Stat. 929]) "authorizing the Federal Trade Commission to make an investigation with respect to agricultural income and the financial and economic condition of agricultural producers generally," for the purpose of enabling Congress to consider whether new legislation should be enacted or existing legislation amended on any of the subjects referred to. The Resolution is somewhat lengthy and it is unnecessary to set it forth here in full. It required the Commission to make an investigation to ascertain the facts with regard to the causes of the unequal distribution between the farmer and others of the income from the principal farm products, particularly as to the existence of certain supposed causes of this condition which are described in the resolution as concentration of control, combinations and monopolies, price fixing and manipulation. Included in the preamble of the Resolution is the following: "Whereas it is charged that through the payment of high and excessive salaries and other devices said middlemen, warehousemen, processors, manufacturers, packers, and others escape just taxation by the United States that said salaries tend unduly to diminish the tax revenues of the United States and tend to burden and restrain interstate and foreign commerce in farm products, and to divert and conceal the earnings and profits of the concerns paying said salaries, and that by various devices those receiving said salaries escape their just share of Federal taxation," and the Commission was directed to investigate and report upon the salaries received by the officers of such companies and "The extent to which said corporations avoid income taxes, if at all, and the extent to which officers receiving such salaries paid income taxes thereon." Section 1, 49 Stat. 930.

On September 19, 1935, the Federal Trade Commission, purporting to act pursuant to the authority of this Resolution, resolved to "investigate and report at the next session of Congress" upon the matters referred to in the Resolution, and on February 4, 1936, the National Biscuit Company received from the Federal Trade Commission two questionnaires designated as Schedule A-7 and Schedule B. . . .

No charge of any violation of law by the National Biscuit Company was made in either of the questionnaires which was the only notice respondent received as to the subject and purpose of the inquiry.

The petition alleges and the return admits "that National Biscuit Company directly and through numerous corporations owned and controlled by it, has been purchasing, producing, manufacturing, selling, distributing, transporting, and shipping, in, from, to and through the several States in and in connection with commerce among the States, substantial quantities of food products, farm products, and products

made from farm products, that is to say, wheat flour, sugar, molasses, milk, butter, cheese, eggs, raisins, peanuts, bread, biscuits, cakes, crackers, and other bakery products and other commodities to petitioner unknown." But in the return respondent alleges "that in addition to the business therein described a large and substantial portion of respondent's business, such as, the manufacturing and processing of the commodities and products which it sells and the sales of products within the confines of a single State, is purely intrastate in character and has no direct effect upon interstate commerce or the interstate business conducted by respondent."

In its answer and objections to the petition, respondent alleges: "13. That the compulsory disclosure of the confidential information which petitioner seeks to exact from the respondent, including the dissemination in the trade of said information relating to respondent's business with particular customers and to respondent's total volume of business, would place respondent at a distinct disadvantage in competing with its business rivals and in dealing with its customers and would otherwise impose a great hardship on respondent in excess of the legitimate public purpose, if any, to be served by the disclosure of said information."

It is also alleged that respondent has been at all times and is now ready and willing to answer the questionnaires involved in this proceeding on the condition that the information in such answers would not be disclosed to the public or to competitors or customers of the respondent, but that the Federal Trade Commission has as yet been unable or unwilling to assure respondent that said information would be confidential.

The schedules received by the National Biscuit Company in substance called for the following information:

"Schedule A-7.

"(Bread and Bakery Products.)

"Question (1) The number of barrels of wheat flour purchased in the year 1935 from each of the various types of distributors such as brokers, mill agents, wholesale grocers, jobbers, including own flour mills.

"Question (2) The names and addresses of the five principal companies in each group from whom you purchased wheat flour during the period reported in Question (1).

"Question (3) The amount of your purchases of wheat flour in the year 1935 in quantities and dollars from each of a list of companies including General Mills, Inc., Pillsbury Flour Mills and others, and then your purchases from all other companies, the total being your total wheat flour purchases in quantities and dollars.

"Question (4) The quantity of bread in pounds and the net dollar sales of all other bakery products sold in the year 1935 to each of



various types of customers including chain stores, cooperative, and voluntary chains, etc., and then sales to all other types of consumers, the total being your total sales of bread and all other bakery products in the year 1935.

"Question (5) The names and addresses of the five principal companies in each of certain groups of distributors to whom you sold wheat flour bread in the year 1935 and the amount of net sales in quantities and dollars sold to each."

On April 1, 1936, respondent supplied the Federal Trade Commission with the information requested in this schedule with the exception of that called for in questions (4) and (5).

"Schedule B.

"(Manufacturers and/or Processors of Farm Products.)

"Question (1) List of all subsidiary companies included in your report.

"Question (2) The quantity and dollar value of all wheat flour, other flour, wheat and other materials purchased in the year 1935 and the quantity and dollar value of the portion thereof resold without further processing.

"Question (3) Net sales of bread, flour and wheat in quantities and dollars and the net dollar sales of all other products for the year 1935 divided according to whether sold without further processing or whether manufactured or processed by you.

"Question 3 (A) Cost of products bought and resold without further processing or manufacturing and then your net cost of materials entering into manufactured products sold.

"Question (4) Names or predecessor companies whose data are included in following questions (5) to (9) inclusive:

"Question (5) Consolidated balance sheets of your company and subsidiaries for the years 1914, 1917, 1920, 1923, and 1926, and net sales for the same periods.

"Question (6) Amounts of capital stock and bonds at par value issued in each of the years from 1914 to 1935 inclusive and the purpose for which the same were issued.

"Question (7) The amounts of additions to and deductions from surplus and the causes thereof in detail in each of the years 1914 and 1935 inclusive.

"Question (8) Consolidated Assets and Liabilities in detail including all subsidiary companies, controlled companies and predecessor companies for the years 1928 to 1935 inclusive.

"Question (9) Consolidated Income and Expense Statements in detail including all subsidiary companies, controlled companies and predecessor companies for the years 1929 to 1935 inclusive.

"Question (10) Name, position, annual cash salary and other compensation paid to each officer of the corporation for the years 1929 to 1935 inclusive."

On May 8, 1936, respondent returned to the Federal Trade Commission Schedule B, having answered all the questions in that schedule except questions (3), (3A), (5), and so much of question (9) as called for information with respect to the amount of total sales and total cost of goods sold, and question (10).

The respondent contends that the compulsory disclosure of information now demanded would constitute an unreasonable search and seizure in violation of the Fourth Amendment of the Constitution of the United States; that the Congress has not authorized the Federal Trade Commission to demand, or this court to compel the disclosure of this information involved in this proceeding; also that the questions which respondent has not answered have no direct connection with interstate commerce or with any violation of law, and that the questions concern respondent's intrastate as well as its interstate activities.

The respondent also takes the position that from the Commission's refusal to assure respondent that any of this information now sought will be used confidentially, it is to be inferred that the Commission will, or at least is likely, to publish all of it, and that respondent knows of no means of preventing the Commission from doing so, if it obtains the information.

Taking up first the question whether Congress has authorized the Commission to compel the disclosures to be made. Section 4 of the Joint Resolution (49 Stat. 931) provides: "For the purpose of carrying out this resolution the Federal Trade Commission, the Attorney General, and the courts of the United States shall have and may exercise all of the powers and jurisdiction severally conferred upon them by the Act entitled 'An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes,' approved September 28 [26], 1914."

Section 6 (a, b) of the Federal Trade Commission Act (15 USCA § 46 (a, b)) provides that it shall have power—

*"Investigation of corporations.* (a) To gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices, and management of any corporation engaged in commerce excepting banks and common carriers subject to the Act to regulate commerce, and its relation to other corporations and to individuals, associations, and partnerships.

*"Reports by corporations.* (b) To require, by general or special orders, corporations engaged in commerce, excepting banks, and common carriers subject to the Act to regulate commerce, or any class of them, or any of them, respectively, to file with the commission in such form as the commission may prescribe annual or special, or both

annual and special, reports or answers in writing to specific questions, furnishing to the commission such information as it may require as to the organization, business, conduct, practices, management, and relation to other corporations, partnerships, and individuals of the respective corporations filing such reports or answers in writing. Such reports and answers shall be made under oath, or otherwise, as the commission may prescribe, and shall be filed with the commission within such reasonable period as the commission may prescribe, unless additional time be granted in any case by the commission."

Section 9 of the act (15 USCA § 49) in the fourth paragraph provides: "Upon the application of the Attorney General of the United States, at the request of the commission, the district courts of the United States shall have jurisdiction to issue writs of mandamus commanding any person or corporation to comply with the provisions of this subdivision of this chapter or any order of the commission made in pursuance thereof."

Respondent takes the position that the power of the Commission to compel information must therefore be limited to disclosures relating to breaches of the law which occur in or which directly affect interstate commerce. This, I think, is not so. On the contrary, it seems to me that the Joint Resolution reflects the intention of the Congress to authorize the Commission to exercise similar powers for the purpose of securing the desired information relevant to the various named subjects on which legislation is contemplated. Unless the Congress intended to give the Commission additional power for the purpose of securing the information, section 4 of the Joint Resolution was unnecessary, for the Commission already had authority to demand the facts relating to a breach of the law.

It was alleged in the petition and admitted in the petition that respondent was engaged in interstate commerce in a substantial degree in the various commodities.

The Fourth Amendment to the Constitution of the United States is not violated by Congress conducting an inquiry and compelling the production of testimony concerning matters on which it is essential that Congress be informed in order to frame legislation. *McGrain v. Daugherty*, 273 U. S. 135, 47 S. Ct. 319, 71 L. Ed. 580, 50 A. L. R. 1.

The Joint Resolution stated "that the Congress should consider whether new legislation should be enacted or existing legislation amended on any of the subjects hereinbefore described and in aid thereof should be informed on all of said subjects." 49 Stat. 929, 930.

Certainly burdens on interstate commerce, monopolies, and taxation referred to in the Joint Resolution, are subjects under the control of the Congress and upon which it is entitled to information. It is true that the facts requested do include some information regarding respondent's activities that are not solely interstate, but the presumption

is that the Congress intends to make use of all the facts obtained in aid of legislation affecting interstate commerce only. In the judgment of the Congress the information requested does directly relate to interstate commerce and lack of such relation is not so clearly non-existent as to justify the court in saying to the contrary. This is a matter for the Congress to decide, at least in the first instance. *Stafford v. Wallace*, 258 U. S. 495, 521, 42 S. Ct. 397, 403, 66 L. Ed. 735, 23 A. L. R. 229.

To support its position respondent relies largely upon *Federal Trade Commission v. American Tobacco Co.*, 264 U. S. 298, 44 S. Ct. 336, 68 L. Ed. 696, 32 A. L. R. 786. But in that case the question was—Has the Federal Trade Commission an unlimited right to obtain the books and records of a corporation with reference to a possible existence of unfair competition in violation of the Federal Trade Commission Act? Any question regarding the power of the Congress to obtain information for legislation purposes was eliminated, and the writs of mandamus seem to have been denied on the ground that the demands were too broad and not only included records and papers that were relevant, but those which clearly were not. In the case at bar the demand is for information deemed by the Congress to be relevant to future legislation on subjects within its jurisdiction.

Accordingly, I think the writ of mandamus must be allowed.<sup>11</sup>

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<sup>11</sup> For a complete survey of Trade Commission inquisitorial powers, see MacChesney and Murphy, "Investigatory and Enforcement Powers of the Federal Trade Commission," 8 Geo. Wash. L. Rev. 581 (1940). Earlier articles of value are Handler, "Constitutionality of Investigations by the Federal Trade Commission," 28 Columbia L. Rev. 708, 905 (1928); Lilienthal, "The Power of Governmental Agencies to Compel Testimony," 39 Harv. L. Rev. 694 (1926) (not limited to Trade Commission cases); and Hankin, "Validity and Constitutionality of the Federal Trade Commission Act," 19 Ill. L. Rev. 17 (1924).

How far may a legislature go in delegating to an administrative body the legislature's own power to use compulsory process to secure information necessary for legislation? This question has two aspects: (1) may the legislature delegate to an administrative body the power to use compulsory process to secure information to be reported to the legislature for action, and (2) may the power be delegated to assist the administrative body in securing information in aid of its own rule making power.

In *Attorney General v. Brissenden*, 271 Mass. 172, 171 N. E. 82 (1930), the Massachusetts Supreme Judicial Court was confronted with the first of these aspects of the question. In that case it appeared that the Massachusetts legislature was contemplating the enactment of legislation concerning the Boston police department, and that it had directed the attorney general to investigate and report his findings concerning a certain pension awarded by the department. Apparently there was some evidence of fraudulent practices. The attorney general was given the power of subpoena. Brissenden refused to respond to the subpoena on the ground, among others, that the act delegating to the attorney general the inquisitorial power of the legislature was unconstitutional and void. Upholding the act the court said, "In the performance of its legislative functions manifestly the General Court may find it needful to acquire information not possessed by its individual members. Investigations of

### Inspection of Premises

**Farmers' Elevator Co. v. Chicago, Rock Island & Pacific Ry. Co., Supreme Court of Illinois, 1915. 266 Ill. 567, 107 N. E. 841.**

CARTER, J. This is an appeal from a decision of the circuit court of Sangamon county affirming an order of the State Public Utilities Com-

various subjects by legislative committees are frequently made to the end that facts relating to the enactment of proposed, or the amendment of existing, statutes may be ascertained and presented in available form for the enlightenment of members of the General Court as a basis of legislation. This method of procedure has been so common as not to require the citation of illustrations. It may be a necessary incident of such method of ascertaining facts to receive evidence and examine witnesses. The only means of assuring the attendance and testimony of witnesses is to compel them to attend and testify. There is no express grant of this power to the General Court by any words of the Constitution. It is an attribute of the power to legislate and follows as an essential implication of that power. . . . In conducting any investigation whether by a committee of its members or through other agency, the General Court is bound to preserve all provisions of the Constitution designed to protect the individual in the enjoyment of life, liberty and property and from inquisitions into private affairs. . . .

"A question of difficulty is whether it is permissible for the General Court to depute the Attorney General to conduct the investigation. . . . The ascertainment of pertinent facts as the basis for legislation is within the power of the law making department of the government. When a legislative body has a right to do an act, it must be allowed to select the means within reasonable bounds. It is not precluded from delegating incidental powers which it may exercise itself in aid of its primary functions but which do not partake of the nature of law making. Authority to obtain information necessary for its determination concerning the exercise of the power to enact laws may be conferred upon nonlegislative bodies, and we are of opinion that there is nothing in the resolves in this particular which transcends the competency of the General Court under the Constitution. Where facts are necessary as a basis for legislative action, the General Court may ascertain them in any reasonable way. Familiar methods are by appropriating the results of studies made by itself or by others, by conducting an inquiry through a committee of its members, or by utilizing an existing commission or board to make and report the results of its research.

"We think that this aspect of the case is within the sweep of the principles declared in *McGrain v. Daugherty*, 273 U. S. 135. It seems to us plainly distinguishable from *Harriman v. Interstate Commerce Commission*, 211 U. S. 407, where the inquiry was voluntarily undertaken by a public board outside of any existing law to aid it in recommending the passage of legislation, without direction from the legislative department, under a statute interpreted to confine the power to compel testimony of witnesses to complaints for contravention of the Interstate Commerce Act or investigations on matters that might have been the subject of complaint. The testimony sought was in aid of an activity outside the scope of the powers conferred upon the Commission. . . .

"This investigation (i. e., the one in the case at hand) follows directly the line of a legislative mandate, presumed to be an aid in determining whether legislation is needed. The personal inconveniences occasioned to the defendant

mission of Illinois requiring a connection of the railroad of appellant, the Chicago, Rock Island & Pacific Railway Company, with the Fox & Illinois Union Railroad at the city of Morris, Illinois.

Some difficulty arises in investigating this record because a large part of it refers to matters other than the order here in question. When the complaint was first filed with the State Public Utilities Commission the Farmers' Elevator Company of Yorkville was the only complainant and the Fox & Illinois Union Railroad Company and the Chicago, Burlington & Quincy Railroad Company were the only defendants; the prayer of the complaint being based on discrimination in rates. Later on, before the hearing was had, and amended petition was filed, including as defendants, in addition to those already named, the Chicago, Rock Island & Pacific Railway Company and the Chicago, Ottawa & Peoria Railway Company, and praying for joint rates between said four defendant corporations, and also for the installation of a physical connection between

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by being required to attend the hearing and to disclose the facts within his knowledge do not differ in kind or degree from those likely to be sustained by any witness compelled against his wish to give testimony. The investigation here authorized and undertaken does not pass beyond the legislative power.  
. . ."

For general discussion of the use of compulsory process by administrative bodies in furtherance of legislative objectives, see Langeluttig, "Constitutional Limitations on Administrative Power of Investigation," 28 Ill. L. Rev. 508 (1933).

By section 21 of the Securities Exchange Act the Commission is expressly authorized to investigate for the purpose of aiding its rule making power and for the purpose of recommending legislation to Congress, and the Commission may use compulsory methods to secure information for such purposes. For discussion of the inquisitorial powers under the Securities Act, see "Investigatory Power of the Securities and Exchange Commission," 44 Yale L. Jour. 819 (1935); Colclough, "Security Exchange Commission's Power of Search," 3 Geo. Wash. L. Rev. 356 (1935).

When the power of subpoena is conferred upon administrative officers for purposes neither judicial nor legislative in nature, and when the subpoena is directed against private persons or business, the constitutional limitations are subjected to especially severe strain. See *Ward Baking Co. v. Western Union Tel. Co.*, 205 App. Div. 723, 200 N. Y. Supp. 865 (1923); 33 Yale L. Jour. 96 (1923), power of subpoena conferred upon the attorney general to inquire into crime.

As to power of the administrative tribunal to compel the furnishing of information concerning a portion of the business not in itself within the jurisdiction of the tribunal, when the tribunal has jurisdiction over other portions of the business, see *Terminal Taxi Cab Co. v. Kutz*, 241 U. S. 252, 60 L. Ed. 984, 36 S. Ct. 583 (1916); *Interstate Commerce Commission v. Goodrich Transit Co.*, 224 U. S. 194, 56 L. Ed. 729, 32 S. Ct. 436 (1912); *United States v. Clyde Steamship Co.*, 36 F. (2d) 691 (1929).

Statutory authorization of the Interstate Commerce Commission to require periodic and special reports from carriers has been upheld in *Baltimore & O. R. Co. v. Interstate Commerce Commission*, 221 U. S. 612, 55 L. Ed. 878, 31 S. Ct. 621 (1911).

the Fox & Illinois Union Railroad Company and the Chicago, Rock Island & Pacific Railway Company, and between the Fox & Illinois Union Railroad Company and the Chicago, Ottawa & Peoria Railway Company. The first hearing before the Commission was held May 12, 1914. Appellant herein, not having been notified, was not present at that hearing, and so, it is conceded, is not bound by that portion of the testimony heard on that date now found in the record. On May 13, 1914, appellant railway company was notified, and on that day its representatives entered its and their appearance; the hearing then being continued until May 27, 1914. On that last mentioned date the complainants reduced their complaint against appellant railway company to the single question of the installation of a physical connection between it and the Fox & Illinois Union Railroad Company. The last named is an electric railway, extending from Yorkville, on the Chicago, Burlington & Quincy Railroad, to Morris, on the railway of appellant company. We judge from the record that the electric road has no cars of its own for the handling of freight, and depends on any connection it may have for equipment for loading grain on its lines for points off its lines. Considerable testimony was taken before one of the commissioners of the State Public Utilities Commission on the last-mentioned date bearing on the question of the physical connection between the two railways in question. It is shown from the testimony introduced, and from the informal discussion that took place on the hearing during that day, that appellant company did not have so much objection to making the physical connection as to the place of connection, proposing through its engineer that such connection be made either east or west of appellant company's yards, which would require the building of considerable additional track and the condemnation of property by the electric road if made east of the yards, and its extension through a subway to be built under the appellant company's tracks and apparently connecting with the tracks of the Chicago, Ottawa & Peoria Railway Company, which at this point runs south of and substantially parallel with the main Rock Island tracks, if the connection was to be made west of the yards. The electric road, on the contrary, wished the connection made with some of the switch or side tracks in appellant company's yards, one or two points being discussed and some testimony taken as to where such connection should be if made in said Rock Island yards. It was finally decided by the Commissioner that the question of the subway to the west should not be considered at that time, but that the representatives of the Fox & Illinois Union Railroad lines should submit to the Commission and to appellant a tentative draft of an order requiring a connection at some point in the railroad yards and the representatives of appellant company should then shortly file any criticism or objection to the order; the Commissioner saying, in substance, at the conclusion of the discussion, that on the filing of any such objections it might



be necessary for all to get together again. With this understanding the hearing adjourned. The tentative order was drawn providing for the connection at a certain point in appellant's switch yard, and a copy submitted on June 1st to the Commission and to the representatives of the appellant company. That company filed its written objections to said tentative order on June 3, 1914. On or about July 20th appellant company received an amended order of the Commission directing the installation of the physical connection prayed for in complainants' petition; that is, a connection in the railroad yards of appellant. No further hearing was had after said May 27, 1914, by the Commission or any member thereof.

A part of said amended order reads:

"The evidence submitted to the Commission concerning the practicability of installing said track connection at Morris, Illinois, being conflicting, and desiring to be advised fully as to same, the Commission caused an investigation to be made of the proposed connection. As a result of this investigation it finds as to the track connections between the Fox & Illinois Union Railroad and the Chicago, Rock Island & Pacific Railroad that such a connection is practical at a point where an extension of the main track of the said Fox & Illinois Union Railroad Company would connect with what is known as the elevator track of the said the Chicago, Rock Island & Pacific Railway Company at a point one hundred and ten (110) feet south of the south line of Wau-ponsee street, at Morris, Illinois. As to this connection it is contended, by the Chicago, Rock Island & Pacific Railway Company and certain shippers located on the line of the elevator track, that a track connection at the point designated would interfere not only with the business of the railroad company but with the industries located on the track in question. From an investigation of the method of handling cars by the Chicago, Rock Island & Pacific Railway Company for the industries located on said elevator track, it would appear that the railway company finds it necessary to move and shift cars from the industries referred to from two (2) to four (4) times per day, depending upon the season and the amount of business handled by the industries, from which it would appear that there would be no difficulty in handling cars to and from said track connection at such times as the Chicago, Rock Island & Pacific Railway Company finds it necessary to shift cars on the elevator track for industries located thereon."

Counsel for the appellant insist that this amended order was entered without a hearing, or at least an adequate hearing, as that term must be understood under said Public Utilities Act. From the provisions of said act, especially sections 45, 60, and 65 (Laws of 1913, p. 460), it is apparent that before such physical railroad connections can be compelled by the State Public Utilities Commission between two railways there must be a hearing, and that, while technical rules of evi-



dence are not required to be followed, the hearing must be open to the public. All parties interested who are to be bound by the decision must be given an opportunity to present evidence and be present, if they wish, during the entire hearing. On a hearing such as this, under said section 65, a record should be kept of all proceedings, and "all testimony shall be taken down by a stenographer appointed by the Commission, and the parties shall be entitled to be heard in person or by attorney."

The public utilities statute is in many of its features similar to the United States statute creating and governing the acts of the Interstate Commerce Commission. The Supreme Court of the United States, in construing that statute, has held that the Interstate Commerce Commission in requiring track connection was not acting in a mere administrative manner, but as such an order as this resulted in the taking of property, therefore the persons interested must not be denied the right to show, as a matter of law that such order was unjust or unreasonable. *Oregon Railroad & Navigation Co. v. Fairchild*, 224 U. S. 510. That court has also held that the Commission, in matters of this kind, is acting in a *quasi*-judicial capacity, and while not limited to the same strict rules of law as to the admissibility of evidence as prevails in suits between private parties (*Interstate Commerce Com. v. Blair*, 194 U. S. 25, 24 Sup. Ct. 563, 48 L. Ed. 860), yet "the more liberal the practice in admitting testimony, the more imperative the obligation to preserve the essential rules of evidence by which rights are asserted or defended. In such cases the Commissioners cannot act upon their own information, as could jurors in primitive days. All parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents and to offer evidence in explanation or rebuttal. In no other way can a party maintain its rights or make its defense. In no other way can it test the sufficiency of the facts to support the finding, for otherwise, even though it appeared that the order was without evidence, the manifest deficiency could always be explained on the theory that the Commission had before it extraneous, unknown, but presumptively sufficient information to support the finding." *Interstate Commerce Com. v. Louisville & Nashville Railroad Co.*, 227 U. S. 88.

See also, *United States v. Baltimore & Ohio Southwestern Railroad Co.*, 226 U. S. 14.

This reasoning as to hearings under the Interstate Commerce Law applies with peculiar force to hearings of this nature under the act here being considered. Allowing the testimony to be heard by the Commission, or one of its members, without any opportunity to cross-examine the witnesses presenting it, amounts to a practical denial of the vital part of the hearing required by this statute. The words "public hearing" before any tribunal or body by the accepted definitions of lexicographers and courts, mean the right to appear and give evidence and also the right to hear and examine the witnesses whose testimony is presented

by opposing parties. See *Dick v. Supreme Body of International Congress*, 138 Mich. 372; 4 Words and Phrases, 3236; 2 Words and Phrases (Second Series) 832, and cases cited; 21 Cyc. 408, and cases cited.

Counsel for appellees insist that the situation is different on this record than is shown in the decisions of the United States courts just referred to; that in those cases evidence was not heard on behalf of the party objecting, while in this case appellant company had the opportunity of introducing all the evidence that its counsel desired on the hearing of May 27, 1914; that the view of the premises by the Commission must be considered similar to the view of the property by the jury during condemnation proceedings. With this we do not agree. A fair construction of the amended order entered by the Commission shows that none of the Commissioners visited Morris personally to look over the premises involved, but that the Commission "caused an investigation to be made" and "as a result of this investigation" entered the order in question. The finding of the Commission was not based upon the evidence heard by it or one of its members, but clearly upon the investigation that it caused to be made. This construction of the order is in accordance with the facts as shown by the record. Furthermore, an order of this nature must be based upon the evidence presented in the public hearing, with a full opportunity to cross-examine the witnesses and present, if desired, evidence in rebuttal, and not upon an *ex parte* examination. In no other way can the interested party maintain his rights or make his defense. . . .

For the reasons indicated it must be held that the final amended order of the Commission in this matter was entered without authority. This holding renders it unnecessary for us to consider the other questions raised by counsel for appellant—that the evidence does not show a public necessity for the taking of property, and that the subject matter of the complaint was not within the jurisdiction of the State Public Utilities Commission.

The judgment of the circuit court must be reversed, and the cause remanded for further proceedings not inconsistent with the views herein expressed.

Reversed and remanded.<sup>12</sup>

**People ex rel. Copcutt v. Board of Health, Court of Appeals of New York, 1893. 140 N. Y. 1, 35 N. E. 320.**

Certiorari by the people of the state of New York on the relation of John Copcutt to review the action of the board of health of the city of

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<sup>12</sup> See Ross, "The Applicability of Common-Law Rules of Evidence in Proceedings Before Workmen's Compensation Commissions," 36 Harv. L. Rev. 263, 292 (1923), for a discussion of the workmen's compensation cases in which *ex parte* investigations have been used although the results of the investigations were not introduced into evidence in the usual manner.

Yonkers in enacting an ordinance declaring certain mill ponds owned by relator in such city to be public nuisances, and directing the issuance of a warrant authorizing the proper officer to remove and abate the same. From a judgment of the General Term (24 N. Y. Supp. 629) affirming the proceedings of the board, relator appeals.

The Nepperhan river is a small stream of water flowing through the city of Yonkers, and across the stream there were several dams, to furnish power to drive machinery. Much complaint having been made to the board of health that these dams created nuisances, the members of the board resolved to hold a meeting on the 27th day of March last to consider the condition of the dams, and they ordered notice to be given to the owners of the dams to show cause at that time why the dams should not be removed. In pursuance of this resolution, notice was served upon the relator, who owned or was interested in two of the dams and the ponds and water powers thereby created, called the "5th" and "6th" water powers, and he appeared before the board at the time and place in person and by counsel, and he gave evidence tending to show that the two dams were not nuisances, and did not create nuisances; and there was also evidence in conflict with the case made by him. After hearing the evidence, the board made its determination that the dams were nuisances, and ordered them removed. The relator then instituted this proceeding by certiorari to review this determination. The board made return to the writ, setting forth all its proceedings and the evidence taken by it, and stated in its return that its determination and action were based "not only upon testimony given by the witnesses, but that the determination of the said board of health, and the members thereof, has been based mainly upon the individual knowledge and experience of the members of said board of health concerning the ponds in the Nepperhan stream, and the condition thereof, inasmuch as each member of the board of health, in performance of the duties imposed by law, has personally inspected and has examined and inquired into the condition of said ponds and of said stream, and that the conclusions reached by this board have been reached and depend largely upon personal knowledge and experience of the individual members of this board, and for this reason it is apparent that this board cannot certify to and reproduce before this court all of the proofs, nor all of the grounds of the determination of said board, nor any considerable part thereof." Upon the return and the papers filed therewith the general term affirmed the action of the board, and then the relator appealed to this court.

EARLE, J. (after stating the facts). The disposition of this case turns largely upon the effect and the construction of the statutes constituting the board of health, and defining its powers and duties, and we will therefore first give attention to the statutes. By chapter 184 of the Laws of 1881 (an act to revise the charter of the city of Yonkers) it

is provided in title 9 that the mayor, the supervisor, the president of the common council, the president of the board of water commissioners, the president of the board of police, and the health officer shall constitute the board of health of the city; and the board is given power among other things, "to suppress, abate, and remove any public nuisance detrimental to the public health," and, in addition to other remedies which it may possess by law, it is empowered to issue its warrant, whenever necessary to the sheriff of the county of Westchester, or to any policeman of the city, authorizing and commanding him to forthwith suppress, abate, and remove such public nuisance, at the expense of the lot whereon the nuisance exists, and of the owner thereof, to be enforced and collected as in the act provided. It is further provided that, in addition to the powers expressly granted in the act, the board shall "have and exercise all the powers now or at any time hereafter conferred upon boards of health in cities by any general law"; and it is authorized to make ordinances, rules and regulations to carry into effect its powers, and to enforce observance of them by penalties, and by action instituted in its name to recover penalties and to restrain and abate the nuisance. By chapter 270 of the Laws of 1885 (the general act for the preservation of the public health) it is provided that the board of health in any city of the state, except the cities of New York, Brooklyn, and Buffalo, shall have the power, and it shall be its duty, "to receive and examine into the nature of complaints made by any of the inhabitants concerning nuisances or causes of danger or injury to life and health within the limits of its jurisdiction; to enter upon or within any place or premises where nuisances or conditions dangerous to life and health are known or believed to exist, and by appointed members or persons to inspect and examine the same, and all owners, agents and occupants shall permit such sanitary examinations, and said board of health shall furnish said owners, agents and occupants a written statement of results or conclusions of such examinations; and every such board of health shall have power, and it shall be its duty, to order the suppression and removal of nuisances and conditions detrimental to life and health found to exist within the limits of its jurisdiction," and "to make, without the publication thereof, such orders and regulations in special and individual cases not of general application, as it may see fit, concerning the suppression and removal of nuisances." It is further authorized to abate nuisances, and to impose penalties for the violation of its orders and regulations, and the violation of them is also made a misdemeanor, and it may commence actions to restrain and abate nuisances, and to enforce its orders and regulations.

A careful examination of the two acts shows that there is no provision for a hearing before the board on the part of any person who is charged with maintaining a nuisance upon his premises. The right to such a

hearing is not expressly given, and cannot be implied from any language found in either act, or from the nature of the subjects dealt with in the acts. Boards of health and other like boards act summarily, and it has not been usual anywhere to require them to give a hearing to any person before they can exercise their jurisdiction for the public welfare. The public health might suffer or be imperiled if their action could be delayed until a protracted hearing could be brought to a termination. There is no provision in the acts for calling or swearing witnesses, and there is no general law giving them power to do so. Section 843 of the Code of Civil Procedure is not applicable to such a case, for the reason that the board is not authorized by law to hear testimony or take the oral examination of witnesses.

The question may be asked, how can these provisions conferring powers upon boards of health to interfere with and destroy property, and to impose penalties and create crimes, stand with the Constitution, securing to every person due process of law before his property or personal rights or liberty can be interfered with? The answer must be that they could not stand if we were obliged to hold that the acts referred to made the determinations of the board of health as to the existence of nuisances final and conclusive upon the owners of the premises where they are alleged to exist. Before such a final and conclusive determination could be made, resulting in the destruction of property, the imposition of penalties and criminal punishments, the party proceeded against must have a hearing, not as a matter of favor, but as matter of right; and the right to a hearing must be found in the acts. *Stuart v. Palmer*, 74 N. Y. 183. As we have said, there is no provision of law giving any party a right to a judicial hearing before these boards, and there is no provision making their determination final. If the decisions of these boards were final and conclusive, even after a hearing, the citizen would in many cases hold his property subject to the judgments of men holding ephemeral positions in municipal bodies and boards of health, frequently uneducated, and generally unfitted to discharge grave judicial functions. Boards of health, under the acts referred to, cannot, as to any existing state of facts, by their determination make that a nuisance which is not in fact a nuisance. They have no jurisdiction to make any order or ordinance abating an alleged nuisance unless there be in fact a nuisance. It is the actual existence of a nuisance which gives them jurisdiction to act. Their acts declaring nuisances may be presumptively valid until questioned or assailed, for the same reasons which give presumptive legality to the acts of official persons under the maxim, "*omnia praesumuntur legitime facta donec probetur in contrarium.*" What operation, then, does the order or ordinance of the board of health have under these acts? The nuisance actually exist-

ing and the jurisdiction having been regularly exercised, the order or ordinance has all the operation and effect provided in the act, and the persons who abate the nuisance have the protection which they would not have as private persons abating, not a private nuisance, especially injurious to them, but a public nuisance injurious to the general public. It may be said that if the determination of a board of health as to a nuisance be not final and conclusive, then the members of the board, and all persons acting under their authority in abating the alleged nuisance, act at their peril; and so they do, and no other view of the law would give adequate protection to private rights. They should not destroy property as a nuisance unless they know it to be such, and, if there be doubt whether it be a nuisance or not the board should proceed by action to restrain or abate the nuisance, and thus have the protection of a judgment for what it may do.

It may further be asked, what, under this view of the law, is the remedy of the owner of property threatened with destruction or actually destroyed as a nuisance? He may have his action in equity to restrain the destruction of his property if the case be one where a court of equity under equitable rules has jurisdiction, or he may bring a common-law action against all the persons engaged in the abatement of the nuisance to recover his damages, and thus he will have due process of law; and, if he can show that the alleged nuisance does not in fact exist, he will recover judgment, notwithstanding the ordinance of the board of health. Thus the views we take of these acts and similar acts conferring powers upon local officers to proceed summarily upon their own view and examination furnish adequate protection to boards of health, to the public, and to property owners, and, while these views are not supported by all the decided cases upon the subject, they have the support of the best reasons and of ample authority. . . . The result of these authorities is that whoever abates an alleged nuisance, and thus destroys or injures private property, or interferes with private rights, whether he be a public officer or private person unless he acts under the judgment or order of a court having jurisdiction, does it at his peril; and when his act is challenged in the regular judicial tribunals it must appear that the thing abated was in fact a nuisance. This rule has the sanction of public policy, and is founded upon fundamental constitutional principles.

The way is now clear to the disposition of this case. The board of health did act, and had a right to act, upon its own inspection and knowledge of the alleged nuisance. It was not obliged to hear any party. It could obtain its information from any source and in any way, and hence its determination upon the question of nuisance is not reviewable by certiorari. *People v. McCarthy*, 102 N. Y. 630. . . . Our conclusion, therefore, is that the judgment of the general term should be affirmed, with costs. All concur.

### Requiring Reports

**United States v. Morton Salt Co., Supreme Court of the United States, 1950. 338 U. S. 632, 94 L. Ed. 401, 70 S. Ct. 357.**

MR. JUSTICE JACKSON delivered the opinion of the court.

This is a controversy as to the power of the Federal Trade Commission to require corporations to file reports showing how they have complied with a decree of the Court of Appeals enforcing the Commission's cease and desist order, in addition to those reports required by the decree itself.

This case illustrates the difference between the judicial function and the function the Commission is attempting to perform. The respondents argue that since the Commission made no charge of violation either of the decree or the statute, it is engaged in a mere "fishing expedition" to see if it can turn up evidence of guilt. We will assume for the argument that this is so. Courts have often disapproved the employment of the judicial process in such an enterprise. Federal judicial power itself extends only to adjudication of cases and controversies and it is natural that its investigative powers should be jealously confined to these ends. The judicial subpoena power not only is subject to specific constitutional limitations, which also apply to administrative orders, such as those against self-incrimination, unreasonable search and seizure, and due process of law, but also is subject to those limitations inherent in the body that issues them because of the provisions of the Judiciary Article of the Constitution.

We must not disguise the fact that sometimes, especially early in the history of the federal administrative tribunal, the courts were persuaded to engraft judicial limitations upon the administrative process. The courts could not go fishing, and so it followed neither could anyone else. Administrative investigations fell before the colorful and nostalgic slogan "no fishing expeditions." It must not be forgotten that the administrative process and its agencies are relative newcomers in the field of law and that it has taken and will continue to take experience and trial and error to fit this process into our system of judicature. More recent views have been more tolerant of it than those which underlay many older decisions. Compare *Jones v. Securities & Exchange Commission*, 298 U. S. 1, with *United States v. Morgan*, 307 U. S. 183, 191.

The only power that is involved here is the power to get information from those who best can give it and who are most interested in not doing so. Because judicial power is reluctant if not unable to summon evidence until it is shown to be relevant to issues in litigation, it does not follow that an administrative agency charged with seeing that the laws are enforced may not have and exercise powers of original inquiry. It has a power of inquisition, if one chooses to call it that, which is not

derived from the judicial function. It is more analogous to the Grand Jury, which does not depend on a case or controversy for power to get evidence but can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not. When investigative and accusatory duties are delegated by statute to an administrative body, it, too, may take steps to inform itself as to whether there is probable violation of the law.

The Commission's order is criticized upon grounds that the order transgresses the Fourth Amendment's proscription of unreasonable searches and seizures and the Fifth Amendment's due process of law clause.

It is unnecessary here to examine the question of whether a corporation is entitled to the protection of the Fourth Amendment. Cf. *Oklahoma Press Publishing Co. v. Walling*, 327 U. S. 186. Although the "right to be let alone—the most comprehensive of rights and the right most valued by civilized men," Brandeis, J., dissenting in *Olmstead v. United States*, 277 U. S. 438, 471, at 478, is not confined literally to searches and seizures as such, but extends as well to the orderly taking under compulsion of process, *Boyd v. United States*, 116 U. S. 616; *Hale v. Henkel*, 201 U. S. 43, 70, neither incorporated nor unincorporated associations can plead an unqualified right to conduct their affairs in secret. *Hale v. Henkel*, *supra*; *United States v. White*, 322 U. S. 694.

While they may and should have protection from unlawful demands made in the name of public investigation, cf. *Federal Trade Commission v. American Tobacco Co.*, 264 U. S. 298, corporations can claim no equality with individuals in the enjoyment of a right to privacy. Cf. *United States v. White*, *supra*. They are endowed with public attributes. They have a collective impact upon society, from which they derive the privilege of acting as artificial entities. The Federal Government allows them the privilege of engaging in interstate commerce. Favours from government often carry with them an enhanced measure of regulation. Cf. *Graham v. Brotherhood of Locomotive Firemen*, 338 U. S. 232; *Steele v. Louisville & Nashville R. Co.*, 323 U. S. 192; *Tunstall v. Brotherhood of Locomotive Firemen & Enginemen*, 323 U. S. 210; *Wickard v. Filburn*, 317 U. S. 111, at 129. Even if one were to regard the request for information in this case as caused by nothing more than official curiosity, nevertheless law-enforcing agencies have a legitimate right to satisfy themselves that corporate behavior is consistent with the law and the public interest.

Of course a governmental investigation into corporate matters may be of such a sweeping nature and so unrelated to the matter properly under inquiry as to exceed the investigatory power. *Federal Trade Commission v. American Tobacco Co.*, *supra*. But it is sufficient if the



inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant. "The gist of the protection is in the requirement, expressed in terms, that the disclosure sought shall not be unreasonable." *Oklahoma Press Publishing Co. v. Walling*, 327 U. S. 186, 208. Nothing on the face of the Commission's order transgressed these bounds.

Nor do we consider whether, for reasons peculiar to these cases not apparent on the face of the orders, these limits are transgressed. Such questions are not presented by the procedure followed by respondents. Before the courts will hold an order seeking information reports to be arbitrarily excessive, they may expect the supplicant to have made reasonable efforts before the Commission itself to obtain reasonable conditions. Neither respondent raised objection to the order's sweep, nor asked any modification, clarification or interpretation of it. Both challenged, instead, power to issue it. Their position was that the Commission had no more authority to issue a reasonable order than an unreasonable one. That, too, was the defense to this action in the court below.

Of course, there are limits to what, in the name of reports, the Commission may demand. Just what these limits are we do not attempt to define in the abstract. But it is safe to say that they would stop the Commission considerably short of the extravagant example used by one of the respondents of what it fears if we sustain this order—that the Commission may require reports from automobile companies which include filing automobiles. In this case we doubt that we should read the order as respondents ask to require shipment of extensive files or gifts of expensive books. This is not a necessary reading certainly, and other parties to the decree seem to have been able to satisfy its requirements.

If respondents had objected to the terms of the order, they would have presented or at least offered to present evidence concerning any records required and the cost of their books, matters which now rest on mere assertions in their briefs. The Commission would have had opportunity to disclaim any inadvertent excesses or to justify their demands in the record. We think these respondents could have obtained any reasonable modifications necessary, but, if not, at least could have made a record that would convince us of the measure of their grievance rather than ask us to assume it.

It is argued that if we sustain this use of § 6, the power will be unconfined and its arbitrary exercise subject to no judicial review or control, unless and until the Government brings suit, as here, for penalties. The Government, it is said, may delay such action while ruinous penalties accumulate and defendant runs the risk that his defenses will not be sustained. However, we are not prepared to say that courts would be powerless if after an effort to clarify or modify such an order it still is considered to be so arbitrary as to be unlawful and the Government

pursues a policy of accumulating penalties while avoiding a judicial test by refusing to bring action to recover them. Since we do not think this record presents the question, we do not undertake to determine whether the Declaratory Judgment Act, the Administrative Procedure Act, or general equitable powers of the courts would afford a remedy if there were shown to be a wrong, or what the consequences would be if no chance is given for a test of reasonable objections to such an order. Cf. *Oklahoma Operating Co. v. Love*, 252 U. S. 331. It is enough to say that, in upholding this order upon this record, we are not to be understood as holding such orders exempt from judicial examination or as extending a license to exact as reports what would not reasonably be comprehended within that term as used by Congress in the context of this Act.

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### Prescribing Uniform Accounting Systems

**American Telephone & Telegraph Co. v. United States, Supreme Court of the United States, 1936. 299 U. S. 232, 81 L. Ed. 142, 57 S. Ct. 170.**

MR. JUSTICE CARDOZO delivered the opinion of the court.

This suit was brought in the United States District Court for the Southern District of New York to set aside an order of the Federal Communications Commission prescribing a uniform system of accounts for telephone companies subject to the Communications Act of 1934, Act of June 19, 1934, chap. 652, 48 Stat. at L. 1064, chap. 652, 47 USCA § 151. The plaintiffs are forty-four telephone companies, thirty-seven of them members of the Bell system, and seven of them members of another group. The defendants are the United States and the Federal Communications Commission, with whom the National Association of Railroad and Utilities Commissioners was afterwards joined, intervening as the representative of the regulatory commissions of forty-six states in support of the contested order.

The Communications Act of 1934 provides (§ 220) that "the Commission may, in its discretion, prescribe the forms of any and all accounts, records, and memoranda" to be kept by carriers subject to the Act, "including the accounts, records, and memoranda of the movement of traffic, as well as of the receipts and expenditures of moneys." This is a power that had previously been lodged with the Interstate Commerce Commission (Interstate Commerce Act, § 20 (5), which framed a set of rules for telephone companies to take effect January 1, 1913, and a revised set of rules effective January 1, 1933. After the transfer of jurisdiction over telephone companies from the Interstate Commerce Commission to the Federal Communications Commission in 1934, the new Commission prepared a "draft of a Uniform System of

Accounts," which was considered at a conference with representatives of the companies and of the state commissions. The outcome of the conference was the order of June 19, 1935, to take effect January 1, 1936, which is the subject of this suit.

The plaintiffs having moved for an interlocutory injunction, the cause was heard, in accordance with the requirement of the statute (47 USCA § 402 (a); 28 USCA § 47) by a District Court of three judges, the affidavits in support of the motion and against it being also submitted for and against the final decree. Five provisions of the order were attacked as arbitrary. The District Court sustained two objections of minor importance, which are not in controversy now, and overruled the others. One of these was directed to the "original cost" rule; the second to a provision as to "just and reasonable" charges; the third to a classification dividing plants in present use from those held for use thereafter. The court dismissed the bill as to the objections overruled, stating in an opinion the reasons for its action. 14 F. Supp. 121. The case is here upon appeal. 48 Stat. at L. 1064, 1093, chap. 652, § 402 (a), 47 USCA § 402 (a); 38 Stat. at L. 219, 220, chap. 32, 28 USCA §§ 47, 47 (a).

This court is not at liberty to substitute its own discretion for that of administrative officers who have kept within the bounds of their administrative powers. To show that these have been exceeded in the field of action here involved, it is not enough that the prescribed system of accounts shall appear to be unwise or burdensome or inferior to another. Error or unwisdom is not equivalent to abuse. What has been ordered must appear to be "so entirely at odds with fundamental principles of correct accounting" (*Kansas City S. R. Co. v. United States*, 231 U. S. 423, 444, 58 L. Ed. 296, 305, 34 S. Ct. 125, 52 L. R. A. (N. S.) 1) as to be the expression of a whim rather than an exercise of judgment. *Norfolk & W. R. Co. v. United States*, 287 U. S. 134, 141, 77 L. Ed. 218, 222, 53 S. Ct. 52; *Kansas City S. R. Co. v. United States*, supra (231 U. S. 456, 58 L. Ed. 309, 34 S. Ct. 125, 52 L. R. A. (N. S.) 1). Then too, in gauging rationality, regard must steadily be had to the ends that a uniform system of accounts is intended to promote. "The object of requiring such accounts to be kept in a uniform way and to be open to the inspection of the Commission is not to enable it to regulate the affairs of the corporations not within its jurisdiction, but to be informed concerning the business methods of the corporations subject to the act that it may properly regulate such matters as are really within its jurisdiction." *Interstate Commerce Commission v. Goodrich Transit Co.*, 224 U. S. 194, 211, 56 L. Ed. 729, 736, 32 S. Ct. 436; cf. *Kansas City S. R. Co. v. United States*, supra (231 U. S. 445, 58 L. Ed. 305, 34 S. Ct. 125, 52 L. R. A. (N. S.) 1). With these principles in mind, we proceed to consider separately the regulations and instructions now challenged as unlawful.

First: *The original cost provisions.*

Four new balance sheet accounts, each of them a sub-title of the general title of "Investments," must be kept under the new system. The first (110.1) is described as Telephone Plant in Service; the second (100.2), Telephone Plant Under Construction; the third (100.3), Property Held for Future Telephone Use; and the fourth (100.4), Telephone Plant Acquisition Adjustment. Account 100.1 "shall include the original cost [defined by Instruction 3 (S. 1)] of the company's property used in telephone service at the date of the balance sheet." Account 100.2 "shall include the original cost [as so defined] of construction of telephone plant not completed ready for service" at such date. Account 100.3 "shall include the original cost [so defined] of property owned and held for imminent use in telephone service under a definite plan for such use." The term "original cost" as appearing in these rules receives [under Instruction 3 (S. 1)] a special definition. "'Original cost' or 'cost,' as applied to telephone plant, franchises, patent rights, and right-of-way, means the actual money cost of (or the current money value of any consideration other than money exchanged for) property at the time when it was first dedicated to the public use, whether by the accounting company or by a predecessor public utility." If actual costs are unknown, estimates are to take their place. Instruction 21 (B). From all this it follows that the sum of the three accounts which represent the original cost of property acquired by the accounting company from other telephone utilities, may be less or greater than the investment in such property by the accounting company itself. The difference is taken care of by account 100.4, Telephone Plant Acquisition Adjustment.<sup>13</sup> The same rule provides in a subdivision designated (C) that "the amounts recorded in this account [i. e., 100.4] with respect to each property acquisition shall be disposed of, written off, or provision shall be made for the amortization thereof in such manner as this Commission may direct."

Before explaining the appellants' objections to these provisions as to cost, we may pause to indicate the reasons that led to their adoption. To a great extent, the telephone business as conducted in the United States is that of a far flung system of parent, subsidiary and affiliated companies. The Bell system is represented in this case by

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<sup>13</sup> "This account shall include the difference between (a) the amount of money actually paid (or the current money value of any consideration other than money exchanged) for telephone plant acquired, plus preliminary expenses incurred in connection with the acquisition; and (b) the original cost (note Instruction 3 (S. 1) of such plant, governmental franchises and similar rights acquired, less the amounts of reserve requirements for depreciation and amortization of the property acquired, and amounts of contributions to the predecessor company or companies for construction and acquisition of such property. If the actual original cost is not known, the entries in this account shall be based upon an estimate of such cost."

thirty-seven companies, the American Telephone and Telegraph Company at their head. Seven other companies, intervening as a group, represent a second and smaller system. Purchases are frequently made by a member or members of a system from affiliates or subsidiaries, and with comparative infrequency from strangers. At times obscurity or confusion has been born of such relations. There is widespread belief that transfers between affiliates or subsidiaries complicate the task of rate-making for regulatory commissions and impede the search for truth. Buyer and seller in such circumstances may not be dealing at arm's length, and the price agreed upon between them may be a poor criterion of value. *Dayton Power & L. Co. v. Public Utilities Commission*, 292 U. S. 290, 295, 78 L. Ed. 1267, 1272, 54 S. Ct. 647; *Western Distributing Co. v. Public Service Commission*, 285 U. S. 119, 76 L. Ed. 655, 52 S. Ct. 283; *Smith v. Illinois Bell Tel. Co.*, 282 U. S. 133, 75 L. Ed. 255, 51 S. Ct. 65. Even if the property has been acquired by treaty with an independent utility or a member of a rival system, there is always a possibility that it is nuisance value only—and not market or intrinsic value for the uses of the business—that has dictated the price paid. Accordingly the work of the Commission may be facilitated by spreading on the face of the accounts a statement of the cost as of the time when the property to be valued was first acquired by a utility or dedicated to the public use. The same considerations show why the regulations do not direct that the inquiry as to original cost shall be carried even farther back, so as to cover, for illustration, the cost to manufacturers who may have sold to the first utility. In the process of analysis, inquiry is halted at the point where it ceases to be fruitful.

With this explanatory background we can now go forward with understanding to a statement of the objections to the order and a determination of their weight.

(a) The companies object that by the "original cost" provisions of the order they are prevented "from recording their actual investment in their accounts" with the result that the accounts do not fairly exhibit their financial situation to shareholders, investors, tax collectors and others.

The argument is that account 100.4, representing the difference between original and present cost, is not to be reckoned, either wholly or in part, as a statement of existing assets, but must be written off completely. The Commission is charged, we are told, with a mandatory duty to extinguish the entire balance recorded in that account, its presence under the title of "investments" having the effect of a misleading label. To give support to that conception of official duty, they rely on subdivision (C), which provides, as we have seen, that "the amounts recorded in this account with respect to each property acquisition shall be disposed of, written off, or provision shall be made for the amortization thereof in such manner as this Commission may direct."

If subdivision (C) had the meaning thus imputed to it, there would be force in the contention that the effect of the order is to distort in an arbitrary fashion the value of the assets. But the imputed meaning is not the true one. The Commission is not under a duty to write off the whole or any part of the balance in 100.4, if the difference between original and present cost is a true increment of value. On the contrary, only such amount will be written off as appears, upon an application for appropriate directions, to be a fictitious or paper increment. This is made clear, if it might otherwise be doubtful, by administrative construction. Thus, the Commission's chief-accountant testified that by the proper interpretation of account 100.4, amounts therein "would be disposed of, after the character of the item had been determined, in a manner consistent with the general rules underlying the uniform system of accounts for the distribution of expenditures, according to their character, to operating expenses, income, surplus, *or remain an investment.*" Other witnesses gave testimony in substance to the same effect. But even more decisive are statements made by counsel, appearing for the Government and arguing the case before us. To avoid the chance of misunderstanding and to give adequate assurance to the companies as to the practice to be followed, we requested the Assistant-Attorney-General to reduce his statements in that regard to writing in behalf of the Commission. He did this and informs us that "the Federal Communications Commission construes the provisions of Telephone Division Order No. 7-C, issued June 19, 1935, pertaining to account 100.4" as meaning "that amounts included in account 100.4 that are deemed, after a fair consideration of all the circumstances, to represent an investment which the accounting company has made in assets of continuing value will be retained in that account until such assets cease to exist or are retired; and, in accordance with paragraph (C) of account 100.4, provision will be made for their amortization."

We accept this declaration as an administrative construction binding upon the Commission in its future dealings with the companies. *Hicklin v. Coney*, 290 U. S. 169, 175, 78 L. Ed. 247, 251, 54 S. Ct. 142; *Matthew Addy Co. v. United States*, 264 U. S. 239, 245, 68 L. Ed. 658, 661, 44 S. Ct. 300. The case in that respect is sharply distinguished from *New York Edison Co. v. Maltbie*, 244 App. Div. 685, 281 N. Y. S. 223; 271 N. Y. 103, 2 N. E. (2d) 277, where under rules prescribed by the Public Service Commission of New York, there was an inflexible requirement that an account similar in some aspects to 100.4 be written off in its entirety out of surplus, whether the value there recorded was genuine or false. The administrative construction now affixed to the contested order devitalizes the objection that the difference between present value and original cost is withdrawn from recognition as a legitimate investment.

We are not impressed by the argument that the classification is to be viewed as arbitrary because the fate of any item, its ultimate disposition, remains in some degree uncertain until the Commission has given particular directions with reference thereto. By being included in the adjustment account, it is classified as provisionally a true investment, subject to be taken out of that account and given a different character if investigation by the Commission shows it to be deserving of that treatment. Such a reservation does not amount to a departure from the statutory power to fix the forms of accounts for "classes" of carriers rather than for individuals. The forms of the accounts *are* fixed, and fixed by regulations of adequate generality. What disposition of their content may afterwards be suitable upon discovery that particular items have been carried at an excessive figure must depend upon evidentiary circumstances, difficult to define or catalogue in advance of the event. If once there was any need for explanation more precise than that afforded by the order, it is now supplied, we think, by an administrative construction which must be read into the order as supplementary thereto.

(b) The companies object that by the provisions as to "original cost" they are prevented "from recovering depreciation expense, which they actually incur, on their actual investment," and are required "to base depreciation charges on the cost to a prior owner."

This objection, like the one last considered, has its origin in the belief that what is recorded in "telephone plant acquisition adjustment" must inevitably be written off, and is not subject to the treatment appropriate to genuine assets.

Here again the construction of the regulations by the Commission itself is enough to dispel the fear that in their practical operation they will become instruments of hardship. Without dwelling on the testimony, we content ourselves with a quotation from the statement filed by counsel at the conclusion of the argument. The Commission there informs us that "when amounts included in account 100.4 are deemed, after a fair consideration of all the circumstances, to be definitely attributable to depreciable telephone plant, provision will be made for amortization of such amounts through operating expenses, through the medium of either account 613 [which covers the amortization of intangible property] or account 675 [which includes all operating expenses not properly chargeable to other accounts]." . . .

(c) The companies object that by the "original cost" provisions of the order they are required, where the actual cost is unknown, to record an estimate of cost, and that this requirement is an arbitrary one, mutilating their accounts and exposing them to the hazard of criminal prosecution.

What was ordered by the Commission in that behalf is expressly authorized by the statute with the result that to invalidate the order will be

to invalidate the statute also. By § 213 (c) of the Communications Act of 1934 it is provided that "if any part of such cost cannot be determined from accounting or other records, the portion of the property for which such cost cannot be determined shall be reported to the Commission; and, if the Commission shall so direct, the original cost thereof shall be estimated in such manner as the Commission may prescribe."

In the vast majority of cases, original cost will be ascertainable from the records of the previous owners. If these have been lost or are not available or trustworthy, the order makes provision for the substitution of an estimate. Difficulties in the making of such an estimate are indicated by the companies. We doubt whether in any instance they will be found to be insuperable, but if they shall ever prove to be so, means will be at hand whereby an avenue of escape from injustice will be opened without resort to the drastic remedy of declaring the order void. Estimates are at times inevitable in any system of accounts. Even under the system previously in vogue, the total purchase price, which was entered in an account known as "telephone plant," was subdivided into a series of accounts covering respectively pole lines, cable, aerial wire, and other classes, and distributed among them. If the price was a lump sum, there was need to resort to estimates in the process of subdivision. So, also, estimates were always necessary upon the retirement of plant or equipment acquired at varying dates, unless the articles retired were so clearly identified that the dates of acquisition and the prices then paid for each of them were susceptible of ascertainment upon the face of the accounts themselves. All that can be said of the present regulations is that they make the occasion for estimates more frequent than in former years and the process more involved. The difference in degree is not proved to be so great as to drag nullity in its train. If instances shall occur in which a company is unable to make an intelligent estimate with even approximate correctness, that exceptional event will justify resort to the Commission for particular instructions. In no event is there a substantial hazard of criminal prosecution. To subject the company or its officers to prosecution for a crime the violation of the Act must have been knowing and wilful. Communications Act of 1934, §§ 501, 502; *Hygrade Provision Co. v. Sherman*, 266 U. S. 497, 502, 503, 69 L. Ed. 402, 406, 407, 45 S. Ct. 141; *United States v. Murdock*, 290 U. S. 389, 78 L. Ed. 381, 54 S. Ct. 223. Penalties do not follow upon innocent mistakes. . . .

Second: *The provisions for just and reasonable charges.*

The companies object to the following instructions (described as 2 (B. 1): "All charges to the accounts prescribed in this classification for telephone plant, income, operating revenues, and operating expenses shall be just and reasonable and any payments by the company in excess of such just and reasonable charges shall be included in account 323 'Miscellaneous income charges.'"



The purpose of this requirement is to prevent the padding of the accounts by charges knowingly and wilfully entered in excess of what is just and reasonable. Only if knowingly and wilfully so entered is any penalty prescribed therefor. *United States v. Murdock*, 290 U. S. 389, 78 L. Ed. 381, 54 S. Ct. 223, *supra*. There is surely nothing arbitrary in establishing a standard of behavior so consistent with good morals. On the contrary, the need for such a standard has been made manifest for years as the result of intercorporate relations that are matters of common knowledge. *Dayton Power & L. Co. v. Public Utilities Commission*, 292 U. S. 290, 78 L. Ed. 1267, 54 S. Ct. 647, *supra*; *Lindheimer v. Illinois Bell Tel. Co.*, 292 U. S. 151, 78 L. Ed. 1182, 54 S. Ct. 658. "The Commission must have power to prevent evasion of its orders and detect in any formal compliance or in the assignment of expenses a 'possible concealment of forbidden practices.'" *Smith v. Interstate Commerce Commission*, 245 U. S. 33, 45, 62 L. Ed. 135, 140, 38 S. Ct. 30. In such a context the standard of the "just and reasonable" is not unduly vague. . . .

Third: *The classification of plant as used in present service or held for use thereafter.*

Property "used in telephone service at the date of the balance-sheet" goes into account 100.1; property "held for imminent use in telephone service" under a definite plan for such use goes into account 100.3; and other property held for future use not imminent or definite goes into still another account, 103, which covers "miscellaneous physical property."

The companies object that this classification is so vague as to be arbitrary. We do not look at it that way. Property held for imminent use in telephone service and under a definite plan will include spare plants kept in reserve as a measure of prudent administration. Such uses had consideration by this court in a recent opinion. *Columbus Gas & Fuel Co. v. Public Utilities Commission*, 292 U. S. 398, 78 L. Ed. 1327, 52 S. Ct. 763, 91 A. L. R. 1403. Property held in present telephone use comes very near to defining itself. If particular situations shall develop ambiguity or doubt, the Commission will be available for clarifying instructions.

Fourth: The evidence does not show that the expense of revising the accounts will lay so heavy a burden upon the companies as to overpass the bounds of reason.

The decree should be affirmed, and it is so ordered.<sup>14</sup>

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<sup>14</sup> Requiring compliance with regulations as to uniform accounts has been upheld as to carriers in *Interstate Commerce Commission v. Goodrich Transit Co.*, 224 U. S. 194, 56 L. Ed. 729, 32 S. Ct. 436 (1912); *Norfolk & W. Ry. Co. v. United States*, 287 U. S. 134, 76 L. Ed. 218, 53 S. Ct. 52 (1932).

The Secretary of Agriculture has been denied the power to inspect all of the books and records of the packers under the Packers and Stockyards Act, 42 Stat. 168 (1921), 7 USCA § 222, in order to determine whether the records

## SECTION 4. SELF-INCRIMINATION

**Brown v. Walker, Supreme Court of the United States, 1896. 161 U. S. 591, 40 L. Ed. 819, 16 S. Ct. 644.**

It appeared that the petitioner had been subpoenaed as a witness before the grand jury, at a term of the District Court for the Western District of Pennsylvania, to testify in relation to a charge then under investigation by that body against certain officers and agents of the Allegheny Valley Railway Company, for an alleged violation of the Interstate Commerce Act. Brown, the appellant, appeared for examination, in response to the subpoena, and was sworn. After testifying that he was auditor of the railway company, and that it was his duty to audit the accounts of the various officers of the company, as well as the accounts of the freight department of such company during the years 1894 and 1895, he was asked the question:

"Do you know whether or not the Allegheny Valley Railway Company transported for the Union Coal Company, during the months of July, August and September, 1894, coal from any point on the Low Grade division of said railroad company to Buffalo at a less rate than the established rates in force between the terminal points at the time of such transportation?"

To this question he answered:

"That question, with all respect to the grand jury and yourself, I must decline to answer for the reason that my answer would tend to accuse and incriminate myself." . . .

MR. JUSTICE BROWN, after stating the case, delivered the opinion of the court.

This case involves an alleged incompatibility between that clause of the Fifth Amendment to the Constitution, which declares that no person "shall be compelled in any criminal case to be a witness against himself," and the act of Congress of February 11, 1893, c. 83, 27 Stat. 443, which enacts that "no person shall be excused from attending and testifying or from producing books, papers, tariffs, contracts, agree-

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and books are being properly kept. *Cudahy Packing Co. v. United States*, 15 F. (2d) 133 (1926).

The use of uniform accounts, particularly capital accounts, to facilitate the determination of the rate base under the current prudent investment theory has been resisted strongly by utility owners and is sometimes severely criticized by accountants as contrary to good accounting principles. This has been true especially of the accounts in which it is nowadays required to record under uniform accounting requirements (1) the original cost (called Electric Plant in Service in the Federal Power Commission accounts), (2) excess of cost to the accounting utility over original cost (called Electric Plant Acquisition Adjustments), and (3) the "write-ups" and other excess elements of "book value" (called Electric Plant Adjustments, and normally deemed illegitimate). See Kripke, "A Case Study in the Relationship of Law and Accounting," 57 Harv. Law Rev. 433 (1944).

ments and documents before the Interstate Commerce Commission, or in obedience to the subpoena of the Commission, . . . on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him, may tend to criminate him or subject him to a penalty or forfeiture. But no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify, or produce evidence, documentary or otherwise, before said Commission, or in obedience to its subpoena, or the subpoena of either of them, or in any such case or proceedings."

The act is supposed to have been passed in view of the opinion of this court in *Counselman v. Hitchcock*, 142 U. S. 547, to the effect that section 860 of the Revised Statutes, providing that no evidence given by a witness shall be used against him, his property or estate, in any manner, in any court of the United States, in any criminal proceeding, did not afford that complete protection to the witness which the amendment was intended to guarantee. . . .

The clause of the Constitution in question is obviously susceptible of two interpretations. If it be construed literally, as authorizing the witness to refuse to disclose any fact which might tend to incriminate, disgrace or expose him to unfavorable comments, then as he must necessarily to a large extent determine upon his own conscience and responsibility whether his answer to the proposed question will have that tendency, 1 *Burr's Trial*, 244; *Fisher v. Ronalds*, 12 C. B. 762; *Reynell v. Sprye*, 1 De Gex, McN. & G. 656; *Adams v. Lloyd*, 3 H. & N. 351; *Merluzzi v. Gleeson*, 59 Maryland, 214; *Bunn v. Bunn*, 4 De Gex J. & S. 316; *Ex parte Reynolds*, 20 Ch. Div. 294; *Ex parte Schofield*, 6 Ch. Div. 230, the practical result would be, that no one would be compelled to testify to a material fact in a criminal case, unless he chose to do so, or unless it was entirely clear that the privilege was not set up in good faith. If, upon the other hand, the object of the provision be to secure the witness against a criminal prosecution, which might be aided directly or indirectly by his disclosure, then, if no such prosecution be possible—in other words, if his testimony operate as a complete pardon for the offense to which it relates—a statute absolutely securing to him such immunity from prosecution would satisfy the demands of the clause in question. . . .

The danger of extending the principle announced in *Counselman v. Hitchcock* is that the privilege may be put forward for a sentimental reason, or for a purely fanciful protection of the witness against an imaginary danger, and for the real purpose of securing immunity to some third person, who is interested in concealing the facts to which he would testify. Every good citizen is bound to aid in the enforcement of the law, and has no right to permit himself, under the pretext of shielding his own good name, to be made the tool of others, who are desirous of seeking shelter behind his privilege. . . .

It is entirely true that the statute does not purport, nor is it possible for any statute, to shield the witness from the personal disgrace or opprobrium attaching to the exposure of his crime; but, as we have already observed, the authorities are numerous and very nearly uniform to the effect that, if the proposed testimony is material to the issue on trial, the fact that the testimony may tend to degrade the witness in public estimation does not exempt him from the duty of disclosure. A person who commits a criminal act is bound to contemplate the consequences of exposure to his good name and reputation, and ought not to call upon the courts to protect that which he has himself esteemed to be of such little value. The safety and welfare of an entire community should not be put into the scale against the reputation of a self-confessed criminal, who ought not, either in justice or in good morals, to refuse to disclose that which may be of great public utility, in order that his neighbors may think well of him. The design of the constitutional privilege is not to aid the witness in vindicating his character, but to protect him against being compelled to furnish evidence to convict him of a criminal charge. If he secure legal immunity from prosecution, the possible impairment of his good name is a penalty which it is reasonable he should be compelled to pay for the common good. If it be once conceded that the fact that his testimony may tend to bring the witness into disrepute, though not to incriminate him, does not entitle him to the privilege of silence, it necessarily follows that if it also tends to incriminate, but at the same time operates as a pardon for the offense, the fact that the disgrace remains no more entitles him to immunity in this case than in the other.

It is argued in this connection that, while the witness is granted immunity from prosecution by the federal government, he does not obtain such immunity against prosecution in the state courts. We are unable to appreciate the force of this suggestion. It is true that the Constitution does not operate upon a witness testifying in the state courts, since we have held that the first eight amendments are limitations only upon the powers of Congress and the federal courts, and are not applicable to the several states, except so far as the Fourteenth Amendment may have made them applicable. *Barron v. Baltimore*, 7 Pet. 243; *Fox v. Ohio*, 5 How. 410; *Withers v. Buckley*, 20 How. 84; *Twitchell v. Commonwealth*, 7 Wall. 321; *Presser v. Illinois*, 116 U. S. 252.

There is no such restriction, however, upon the applicability of federal statutes. The Sixth Article of the Constitution declares that "This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything

in the Constitution or laws of any state to the contrary notwithstanding." . . .

The act in question contains no suggestion that it is to be applied only to the federal courts. It declares broadly that "no person shall be excused from attending and testifying . . . before the Interstate Commerce Commission . . . on the ground . . . that the testimony . . . required of him may tend to criminate him," etc. "But no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may testify," etc. It is not that he shall not be prosecuted for or on account of any crime concerning which he may testify, which might possibly be urged to apply only to crimes under the federal law and not to crimes, such as the passing of counterfeit money, etc., which are also cognizable under state laws; but the immunity extends to any transaction, matter or thing concerning which he may testify, which clearly indicates that the immunity is intended to be general, and to be applicable whenever and in whatever court such prosecution may be had.

But even granting that there were still a bare possibility that by his disclosure he might be subjected to the criminal laws of some other sovereignty, that, as CHIEF JUSTICE COCKBURN said in *Queen v. Boyes*, 1 B. & S. 311, in reply to the argument that the witness was not protected by his pardon against an impeachment by the House of Commons, is not a real and probable danger, with reference to the ordinary operations of the law in the ordinary courts, but "a danger of an imaginary and unsubstantial character, having reference to some extraordinary and barely possible contingency, so improbable that no reasonable man would suffer it to influence his conduct." Such dangers it was never the object of the provision to obviate.

The same answer may be made to the suggestion that the witness is imperfectly protected by reason of the fact that he may still be prosecuted and put to the annoyance and expense of pleading his immunity by way of confession and avoidance. This is a detriment which the law does not recognize. There is a possibility that any citizen, however innocent, may be subjected to a civil or criminal prosecution, and put to the expense of defending himself, but unless such prosecution be malicious, he is remediless, except so far as a recovery of costs may partially indemnify him. . . .

If, as was justly observed in the opinion of the court below, witnesses standing in Brown's position were at liberty to set up an immunity from testifying, the enforcement of the Interstate Commerce Law or other analogous acts, wherein it is for the interest of both parties to conceal their misdoings, would become impossible, since it is only from the mouths of those having knowledge of the inhibited contracts that the facts can be ascertained. While the constitutional provision in

question is justly regarded as one of the most valuable prerogatives of the citizen, its object is fully accomplished by the statutory immunity, and we are, therefore, of opinion that the witness was compellable to answer, and that the judgment of the court below must be affirmed.

MR. JUSTICE SHIRAS, with whom concurred MR. JUSTICE GRAY and MR. JUSTICE WHITE, dissenting.<sup>15</sup>

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<sup>15</sup> The protection of the incrimination clause of the Fifth Amendment does not extend to corporations. *Hale v. Henkel*, 201 U. S. 43, 50 L. Ed. 652, 26 S. Ct. 370 (1906); *Wilson v. United States*, 221 U. S. 361, 55 L. Ed. 771, 31 S. Ct. 538 (1911).

*As to the need of establishing immunity from prosecution by another sovereign*, see *United States v. Murdock*, 284 U. S. 141, 76 L. Ed. 210, 52 S. Ct. 63 (1931), where the court said at p. 149, "This court has held that immunity against state prosecution is not essential to the validity of federal statutes declaring that a witness shall not be excused from giving evidence on the ground that it will incriminate him, and also that lack of state power to give witnesses protection against federal prosecution does not defeat a state immunity statute. The principle established is that full and complete immunity against prosecution by the government compelling the witness to answer is equivalent to the protection furnished by the rule against compulsory self-incrimination." Noted in 45 *Harv. L. Rev.* 595 (1932).

Also see *Feldman v. United States*, 322 U. S. 487, 88 L. Ed. 1408, 64 S. Ct. 1082 (1944), holding that the clause in the Fifth Amendment providing that in a criminal case a man cannot be compelled to be a witness against himself does not prevent the federal government from utilizing incriminating testimony given to state authorities under a state immunity statute.

*As to the need of making an affirmative claim of the immunity privilege*, see *United States v. Monia*, 317 U. S. 424, 87 L. Ed. 376, 63 S. Ct. 409 (1943).

## CHAPTER V

### THE HEARING

#### SECTION 1. THE REQUIREMENT OF A FAIR TRIAL

##### Partisan Interest—Injudicious Conduct

**Inland Steel Co. v. National Labor Relations Board, Circuit Court of Appeals, Seventh Circuit, 1940. 109 F. (2d) 9.**

[The National Labor Relations Board issued its complaint against the Inland Steel Company upon charges made jointly by the Steel Workers' Organizing Committee and the Amalgamated Association of Iron, Steel and Tin Workers that the company was engaging in unfair labor practices. The complaint alleged that a majority of the company's employees had designated the SWOC as their agent for collective bargaining, that the company had refused to bargain with the SWOC, and that the company had dominated and interfered with the organization and conduct of a "company union" known as the Steel Workers Independent Union. After a lengthy hearing before an examiner the proceedings were transferred to the Board, which issued an order that Inland disestablish the "Independent Union" and bargain with SWOC. Inland filed a petition in the Circuit Court of Appeals to review and set aside the order. One of the principal grounds urged for reversal was that Trial Examiner Charles A. Wood's conduct of the hearings was so partisan and biased as to constitute a denial of due process. The Board maintained that the examiner's conduct was characterized by complete impartiality with the single purpose of insuring a record which would fully and fairly present all aspects of the questions presented.]

MAJOR, Circuit Judge. . . . At the commencement of the hearing, the Trial Examiner adopted the practice of interrupting counsel and witnesses, and compelling further argument or statements to be "off the record." The court reporter was forbidden to take notes of such "off the record" matter. When back "on the record," the Examiner would summarize what had taken place "off the record." Over objection of counsel, this practice continued during the first five days of the hearing, culminating in an incident which occurred on the afternoon of the fifth day, upon which great stress is laid. It seems that Inland, at its own expense, but at the request of the Board, had prepared a list of the names and occupations of 6135 employees, claimed by the Board to be

members of the SWOC. This exhibit, no copy of which had been made, was introduced by the Board, and counsel for Inland asked leave to withdraw it. It was claimed by Inland it was important that it have the exhibit in the preparation of its case, but its request in this respect was denied by the Examiner. The next morning Inland brought to the hearing room its own reporter for the purpose of taking the "off the record" proceedings which the Examiner had directed the official reporter not to take. The Trial Examiner stated in effect, that Inland was not entitled to its reporter in the room for the reason the official reporter had a contract with the Government and a monopoly on the stenographic rights. The official reporter, after consulting with his superior, advised the Examiner to the effect that if the Examiner would permit him to transcribe the "off the record" material and furnish Inland with copies thereof, that he objected to any other reporter taking the proceedings. On the other hand, if the Examiner would not permit the official reporter to take the "off the record" matter, then he had no objection to the private reporter taking the same. Whereupon the Examiner forbid both the official reporter and Inland's reporter to take any "off the record" matter.

Inland's counsel directed its reporter to continue taking notes, whereupon the Trial Examiner sent for a Deputy United States Marshal and had him ejected from the hearing. Thereupon, Inland's counsel withdrew from the hearing. Upon appeal to the Board by telegram, the Trial Examiner was promptly instructed to permit the official reporter to take and transcribe all "off the record" material and to furnish Inland with such transcriptions. It is argued by Inland that this incident in itself demonstrates, in the early stages of the hearing, the non-judicial attitude and the bitter animosity which the Examiner had against Inland and, that he deliberately intended in his "off the record" remarks to influence the result and, at the same time, preclude a review thereof.

On the other hand it is argued by the Board that this incident merely illustrates the contemptuous behavior of Inland's reporter, supported by its attorneys. While in our opinion, both the reporter and counsel should have complied with the order and direction of the Examiner and preserved exceptions thereto, yet their failure in this respect is no defense. In fact, it is entirely beside the point. The Board also seeks to justify the Examiner's conduct, not only by specific provision of the Board's rules and regulations, but by his inherent authority to maintain order in an administrative proceeding. Neither do we think this argument is pertinent. It is our opinion that the act of the Examiner in refusing Inland's request to have its own reporter present for the purpose of taking and transcribing the proceeding was unwarranted and inexcusable. That he was in error in directing the official reporter to omit the "off the record" matter, was recognized by the Board by their prompt action in directing the Examiner to reverse his ruling in this



respect. But this action of the Board does not answer Inland's contention that it was entitled to its own reporter as a matter of right. We think this contention must be sustained. A public hearing was in progress in a room in a Federal building with a seating capacity of 300 persons. It is inconceivable to us that any interested party should be refused the right to have present their own reporter for the purpose of making a record of everything said during the hearing. Of course the record made by such reporter would not be official, and just how and in what manner it could be used was the sole concern of Inland, and not the Examiner. . . .

The conduct of the Examiner in this respect is relied upon as disclosing his hostile attitude, and we think there is merit in this contention. While we do not attach as much importance to the incident as Inland would have us do, yet we are convinced that the circumstance indicates an erroneous conception on the part of the Examiner which resulted in the deprivation of a substantial right.

Another attack made upon the Examiner arises from his alleged hostile and coercive examination of witnesses. It is argued his conduct in this respect demonstrates that he was acting as a partisan on the Board's side, rather than in a judicial capacity. Many pages of petitioner's brief are directed at this criticism, where we are cited to numerous pages of the voluminous record in support thereof. After reading and studying the instances specifically called to our attention, as well as other portions of the record, we are forced to the conclusion that the conduct of the Examiner in this respect plainly discloses he laid aside all semblance of serving in a judicial capacity. It seems impossible, within the limitations at our disposal, to set forth the language of the examination of witnesses by the Examiner from which our conclusion in this respect is reached. To obtain the complete picture requires a reading of the record.

During the hearing, the practice followed consisted of a direct examination by the party who introduced the witness, a cross-examination by the opposite party, followed by an examination by the Examiner. We think it can be stated as a general proposition (there may be exceptions) that the Examiner devoted very little time to the examination of important witnesses favorable to the Board, while on the other hand, his examination of important witnesses for Inland was of great length, indulged in apparently for the purpose of impairing the credit or weight to be attached to their testimony. . . .

Inland called around 700 witnesses, included by the SWOC in its membership list for the purpose of proving that such witnesses had resigned from the SWOC and joined the Independent prior to June 8, 1937. The direct examination was brief generally, and related solely to the situation stated. Counsel for the Board was permitted to cross-examine such witnesses in great detail, not merely as to what they knew

concerning the subject matter of the examination, but as to what they thought or believed was the attitude of Inland with reference to the Independent. Many times during the examination of such witnesses, the Trial Examiner commented that the witness was "evasive" or "unsatisfactory," or that he "obviously understands and does not care to answer." . . . On one occasion, he stated: "My considered opinion, after listening to 200, is that the witnesses have been deliberately evasive on that particular question, deliberately." Some of these witnesses were interrogated by the Trial Examiner as to who paid for their bus fare and lunch when they came to Chicago to testify, and whether or not liquor was furnished them or their fellow employees.

It is argued by petitioner that the nature of the cross-examination and the characterization of witnesses by the Trial Examiner was such as to intimidate them and to adduce improper evidence useful to the purpose of the Board. We think it was calculated to have such effect. In fact, the witness Hokanson was pressed to the point where he stated: "I didn't have an opinion at the time, as I said before, but you are forcing me to say whether I had, and really at the time I signed the card, I didn't have any opinion as to the company's feelings."

[In the footnotes to the case the court copied several excerpts from the cross-examination. A portion of the Examiner's cross-examination of Hill and Adams, witnesses for Inland, will illustrate his effort to browbeat the witnesses into an admission of being company spies, and his comment on the demeanor of the witnesses.']

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1. . . "Q. Hill, you are an R. A. & I. man, are you not? A. What is that?

"Q. You are an R. A. & I. man, are you not? A. I don't know what that is.

"Q. Have you ever done any industrial service work? A. No, sir.

"Q. None whatever? A. No, sir.

"Q. Do you know what 'dry cleaning' means? A. No, sir.

"Mr. Friedlich: What what means? I did not hear you.

"Trial Examiner Wood: Dry cleaning.

"Q. Do you know what money outside of a regular salary means for espionage work? A. Certainly.

"Q. What is it called? A. I couldn't tell you.

"Q. You just said 'Certainly.' A. Well, that is getting payment of money under two jobs, that is the way I mean.

"Q. I asked you what it was called and you said 'Certainly,' you knew What is it? A. Well, I don't know.

"Q. You have never participated in any industrial investigation, so-called? A. No, sir, I haven't.

"Q. Never been employed by a detective agency in your life? A. No, sir.

"Q. Every time you go to an employment office in a steel company to sign up for a job you list all of the firms for which you ever worked, don't you? A. Not all of them in that way.

"Q. You usually list your past employment when you apply at a steel office? A. Certainly.

Another situation cited as disclosing the unfair attitude of the Examiner, has to do with the testimony of Margaret Vevurka and Margaret Warner. Because of the uncertainty of the date when many of the 700 witnesses resigned from the SWOC and joined the Inde-

"Q. And you found that your short experience with so many companies have been a recommendation so far as personnel is concerned, have you not? A. No, I think that is taken under the wrong light. I have worked at a lot of these different places on construction jobs and that is the reason some of them were of such a short duration.

"Q. What explanation have you for the shortness of your work in so many steel companies apart from that?

"Mr. Friedlich: I object, if the Examiner please. I should have objected earlier but I think this spy phobia has probably gone far enough and I think the Examiner on consideration will agree with me. In any event, I object.

"Trial Examiner Wood: Counsel, if you will please give way to my much broader experience in this field than yours.

"Mr. Friedlich: Well, I will be very glad to do it but I will have to stand on my objection unless it is overruled.

"Trial Examiner Wood: Your objection is overruled.

"Mr. Friedlich: Exception. . . .

"What is your name? A. Charles Adams.

"Q. You have been having a lot of difficulty with your handkerchief and your bottle that you have been clutching and contortions. Isn't it a fact that your cold is a fake? A. No.

"Q. No?

"Q. You are an operative? A. Sir?

"Q. Do you know what an operative is? A. I can't hear you.

"Q. Are your ears bad, too? A. Yes.

"Q. They are? A. Yes.

"Q. Have they become bad since I started to ask you questions? A. No, it is due to this cold. I have a very bad throat and I have to go to the doctor tonight, the Inland doctor in Hammond. He has also told me not to work.

"Q. How do you account for all the jobs you have had in the last two years? A. Well, if I find it necessary I will bring in the records, if you want me to come in when I talk better.

"Q. Have you answered my question? A. Sir?

"Q. Have you answered my question?

"Trial Examiner Wood: Read my question.

(Question read)

"The Witness: On account of temporary lay-offs mostly and they transferred us around, see, from one department to another rather than lay us off entirely.

"Q. What has that to do with the question I asked you?

"Q. What industrial investigation have you done? Why do you hesitate? A. None at all.

"Q. You never worked for any detective agency? A. No, sir.

"Q. R. A. and I? A. No, sir.

"Q. You know what I mean? A. Yes.

"Trial Examiner Wood: The Trial Examiner will comment that the demeanor of this witness is highly unsatisfactory." . . .

pendent, these two witnesses, who were in the office of the Independent, testified with reference to the application cards issued to members of that organization. The letters "C. I." referred to "Card Issued" and were written in ink under the date of issuance. The Examiner propounded many questions during the original and cross-examination of these witnesses, and his own independent examination of the witness Vevurka occupies 38 pages of the record. It is apparent, from a reading of the examination of these two witnesses, that the purpose of the Examiner was to discredit their testimony. For instance, he required the witness Vevurka to write the letters "C. I." together with the date, eight times on a piece of paper. He required the witness Warner to do likewise. She then was asked to turn the paper over and write the same letters several times more on the back of the sheet. He then stated: "The Trial Examiner will comment that the two specimens offered by the witness Warner indicate to the Trial Examiner, with the little experience he has had in comparing writings, that the first was an attempt to make 'C's' different from those normally made by the witness."

Shortly after these two witnesses had testified, there was called by the Board the witness James, Recording Secretary of Amalgamated Lodge No. 1101, and following him, the witness Formentini, both of whom testified concerning a strike resolution appearing in the lodge record. It appears that the date of the meeting at which this resolution was passed, as well as the phraseology of the resolution, was regarded as important by the Board. Petitioner's counsel cross-examined these witnesses at some length and it was claimed the record had been intentionally altered shortly before the hearing for the express purpose of benefiting the Board's case. A reading of the testimony of these witnesses convinces us that the record had been tampered with and we think it is a reasonable inference it was done for the purpose charged. Notwithstanding this situation, the Trial Examiner apparently was not concerned with the situation—at any rate he made no effort to discredit their testimony. His complacent attitude in this respect was in striking contrast to that exhibited by him only a short time before with reference to petitioner's witnesses, Vevurka and Warner. It is difficult to reconcile his attitude in this respect except upon the theory that his purpose was deliberately to discredit the testimony of petitioner's witnesses concerning an important record, while at the same time refrain from saying or doing anything to disparage witnesses who had given testimony of a dubious nature concerning a record regarded as important in support of the Board's case. . . .

The Act authorizes the Board to enter an order upon a complaint alleging unfair labor practices, only after a "hearing." This must mean a trial by a tribunal free from bias and prejudice and imbued with the desire to accord to the parties equal consideration. There is perhaps no more important right to which litigants are entitled than

that they be given such a trial. Its impairment, ipso facto, brings the court, and administrative bodies as well, into public disrepute, and destroys the esteem and confidence which they have enjoyed so generally. Time and experience have demonstrated that the public, as well as litigants, will tolerate the honest mistakes of those who pass judgment, but not the biased acts of those who would deprive litigants of a fair and impartial trial. Foremost among the responsibilities imposed upon a reviewing court, is to make sure that this foundation of our judicial system be not undermined.

That a trial by a biased judge is not in conformity with due process is sustained by the authorities. In *Tumey v. Ohio*, 273 U. S. 510, 535, 47 S. Ct. 437, 445, 71 L. Ed. 749, 50 A. L. R. 1243, the court said: ". . . No matter what the evidence was against him, he had the right to have an impartial judge. . . ."

The court, in *Jordan v. Massachusetts*, 225 U. S. 167, 176, 32 S. Ct. 651, 652, 56 L. Ed. 1038 said: "Due process implies a tribunal both impartial and mentally competent to afford a hearing. . . ."

The principle is aptly stated in *People v. Naimark*, 154 App. Div. 760, 139 N. Y. S. 418, 420, where it is said: ". . . The first idea in the administration of justice . . . is that a judge must necessarily be free from all bias and partiality. He cannot be both judge and party, arbiter and advocate in the same cause. Mankind are so agreed in this principle that any departure from it shocks their common sense and sentiment of justice."

And the fact that the court's judgment may be justified on the merits does not obviate the requirement of a fair trial. As was said in *Union Pacific R. Co. v. Syas*, 8 Cir., 246 F. 561, at page 568: ". . . But no judgment is just, if not obtained by due process of law; otherwise, courts could enter judgments without trial. . . ."

The recognition of the principle is as essential in proceedings before administrative agencies as it is before courts. As was said in *Ohio Bell Telephone Co. v. Public Utilities Commission*, 301 U. S. 292, at page 304, 57 S. Ct. 724, at page 730, 81 L. Ed. 1093: ". . . Indeed, much that they do within the realm of administrative discretion is exempt from supervision if those restraints have been obeyed. All the more insistent is the need, when power has been bestowed so freely, that the 'inexorable safeguard' [citing cases] of a fair and open hearing be maintained in its integrity. [Citing cases.] The right to such a hearing is one of 'the rudiments of fair play' [citing case] assured to every litigant by the Fourteenth Amendment as a minimal requirement. [Citing cases.] There can be no compromise on the footing of convenience or expediency, or because of a natural desire to be rid of harassing delay, when that minimal requirement has been neglected or ignored."

The rule is again clearly stated in *Morgan v. United States*, 304 U. S. 1, 14, 58 S. Ct. 773, 999, 82 L. Ed. 1129.

The Board argues that even though the criticism directed at the Trial Examiner be justified, yet the order should not be set aside because petitioner has failed to prove that its case was prejudiced, or that any evidence favorable to it was kept from the record. It is further argued that the transfer of the proceedings to the Board with no intermediate report on the part of the Examiner is conclusive against petitioner. We are not impressed with either of these arguments. To say that petitioner was not prejudiced because of the unfair and biased manner in which the case was tried by the Trial Examiner, is purely a matter of speculation. We shall not reiterate what we have heretofore said in connection therewith. We merely call attention to the fact that during the first five days of the hearing, certain of the proceedings were "off the record." What they consisted of is impossible of determination. Likewise, there is no way of ascertaining the disadvantage occasioned petitioner, by the requirement imposed upon it with reference to obtaining the process of subpoena. Neither can the effect had upon witnesses produced by the hostile attitude of the Examiner, be measured. If dealing in assumptions, we would assume that the witnesses for the Board were encouraged and perhaps emboldened, while those for petitioner were discouraged, if not actually intimidated. It is true, the Board ordered the proceedings transferred to it even before the hearing was concluded and, thereafter, the case was decided without an intermediate report by the Examiner. But we are unable to comprehend how the Board could restore to the petitioner a right of which it had been deprived by the Trial Examiner—that is, a fair and impartial hearing. In fact, the Board, in its decision, made no mention of the charge of bias directed against its Examiner, and this, notwithstanding that the matter was fully presented to it in oral argument. The Court, in *Montgomery Ward & Co. v. National Labor Relations Board*, 8 Cir., 103 F. 2d 147, on page 156, considered a situation similar to the one here presented, and we agree with the statement made: "This fault runs throughout the hearing. These matters were called to the attention of the Board in exceptions filed to the intermediate report of the examiner. They were not recognized nor rectified in any instance. We see no way in which the injustice done by this character of hearing can be righted except by setting aside the order of the Board in entirety and remanding the case to it for a new hearing before another examiner and a determination by the Board upon the record to be made upon such new hearing. The delay necessary to a new hearing is regrettable but avoidance of delay cannot justify a tolerance of violation of rights fundamental in the administration of justice. . . ."

[The Board order was set aside and the case was remanded.] <sup>2</sup>

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<sup>2</sup> Fortunately proceedings such as those presided over by the examiner in the *Inland Steel* case are comparatively rare occurrences, and yet they do happen.

**Federal Trade Commission v. Cement Institute, Supreme Court of the United States, 1948. 333 U. S. 683, 92 L. Ed. 1010, 68 S. Ct. 793.**

MR. JUSTICE BLACK delivered the opinion of the court.

We granted certiorari to review the decree of the Circuit Court of Appeals which, with one judge dissenting, vacated and set aside a cease

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It is not inappropriate to quote the concluding paragraph of a recent article by a master of jurisprudence.

"There has come to be a cult of force throughout the world. In place of the political and legal theory on which our government was founded and under which America has grown to be a land to which people have been eager to come from every part of the world in order to live the lives of free men and enjoy life, liberty, and property in security, new theories are being advanced. Instead of our fundamental doctrine that government is to be carried on according to law we are told that what the government does is law. Instead of a law which thinks of citizens and officials as equally subject to law, we are told of a public law which subordinates the citizen to the official and enables the latter to put the claims of one citizen over those of another, not according to some general rule of law but according to his personal ideas for the time being. A give-it-up philosophy of law and government is being widely taught. We are told that law is to disappear in the society of the future. We are told of a society in which an omniscient and benevolent government will provide for the satisfaction of the material wants of everyone and there will be no need of adjusting relations or ordering conduct by law since everyone will be satisfied. Thus there will be no rights. There will only be a general duty of passive obedience. We need to be vigilant that while we are combatting regimes of this sort, as they have developed in dictatorships and totalitarian governments, we do not allow a regime of autocratic bureaus to become so entrenched at home as to lead us in the same direction." Pound, "Administrative Law and the Courts," 24 B. U. L. Rev. 201 (1944).

See Comment, "The Disqualification of Administrative Officials," 41 Columbia L. Rev. 1384 (1941), discussing such matters as bias, prejudgment, the prosecutor-judge combination, as well as disqualification for interest; also see Scott, "Bias of Trial Examiner and Due Process of Law," 30 Geo. L. Jour. 54 (1941); Godman, "Disqualification for Bias of Judicial and Administrative Officers," 23 N. Y. U. L. Q. Rev. 109 (1948); Davis, "Bias of Administrative Officers," 32 Minn. L. Rev. 199 (1948).

One of the arguments principally relied on by the Board in the Inland Steel case was its contention that the result reached was justified on the merits—that the same decision would have been reached if the Trial Examiner's behavior had been a model of judicial decorum. The court ruled, however, ". . . the fact that the . . . judgment may be justified on the merits does not obviate the requirement of a fair trial."

The problem of measuring the prejudice resulting from improper behavior on the part of the hearing officer has been a difficult one for the courts.

In some cases, the court has said that so long as the result reached is right, where the evidence amply supports the conclusions of the agency, it is not a basis for voiding the administrative order that the hearing was improperly conducted. *National Labor Relations Board v. Western Cartridge Co.* (CCA 2nd, 1943), 138 F. (2d) 551. Similarly, in *National Labor Relations Board v. Ford Motor Co.* (CCA 6th, 1940), 114 F. (2d) 905, it was ruled that the court should not set aside the administrative order because of the hearing officer's misconduct, unless material prejudice to respondent clearly appears.

On the other hand, many cases could be cited in accord with the remarks

and desist order issued by the Federal Trade Commission against the respondents. 157 F. (2d) 533. Those respondents are: The Cement Institute, an unincorporated trade association composed of 74 corporations which manufacture, sell and distribute cement; the 74 cor-

in the Inland Steel case. In *National Labor Relations Board v. Phelps, Jr.* (CCA 5th, 1943), 136 F. (2d) 562, the court declared that the existence of evidence in support of the agency's conclusions is immaterial; since, once partiality appears, it vitiates the entire proceedings. To the same effect is *National Labor Relations Board v. Washington Dehydrated Food Co.* (CCA 9th, 1941), 118 F. (2d) 980, 997, where the court said: "The Act authorizes the Board to enter an order . . . only after a 'hearing.' This must mean a trial by a tribunal free from bias and prejudice and imbued with the desire to accord to the parties equal consideration."

Which of these conflicting views is preferable? In considering the problem, it seems fair to ask: Is it possible to ascertain the effect of injudicious conduct on the part of the hearing officer? Can it be demonstrated whether actual harm resulted? How can it be told whether the result reached by the agency was correct?

In the Inland Steel case, the court concluded that although respondent could not prove that specific evidence favorable to it was kept from the record, still it would be pure speculation to say that respondent was not prejudiced. The court was willing to assume, on the record before it, that witnesses for the Board were encouraged, and those for respondent discouraged. This would seem to imply that in examining the record, to ascertain the probable effect of injudicious conduct on the part of the hearing officer, there is at best an inference—which may be tenuous and strained, or may be quite persuasive—that the result might have been otherwise had the hearing been properly conducted. Should the burden be on the respondent to show prejudice, or should the burden be on the agency to demonstrate that there was no prejudice?

Suppose the evidence is closely balanced, and it appears that the agency made no effective effort to correct the hearing officer's misbehavior? See *Montgomery Ward & Co. v. National Labor Relations Board* (CCA 8th, 1939), 103 F. (2d) 147.

Suppose, on the other hand, it fairly appears that respondent was able to get into the record enough evidence to establish the defenses on which it relied, and that the agency (in its post-hearing consideration of the case) took effective steps to erase the effect of the hearing officer's misbehavior, and that the agency decision was on a point of law, so that the granting of a new trial would clearly not affect the final result?

If the hearing officer credits all the testimony offered on behalf of one party, and discredits all the testimony offered by the other (despite corroboration thereof) is this a basis for concluding that the officer was prejudiced? Cf. *Local No. 3 United Packing-House Workers of America, C. I. O. v. National Labor Relations Board* (CA 8th, 1954), 210 F. (2d) 325; *National Labor Relations Board v. Pittsburgh S. S. Co.*, 337 U. S. 656, 93 L. Ed. 1602, 69 S. Ct. 1283 (1949).

Is bias shown by the fact that the hearing examiner had a private consultation with government counsel? *Acosta v. Landon* (D. C. Cal., 1954), 125 F. Supp. 434. Should a luncheon date with counsel for respondent stand on a different plane?



porate members of the Institute; and 21 individuals who are associated with the Institute. It took three years for a trial examiner to hear the evidence which consists of about 49,000 pages of oral testimony and 50,000 pages of exhibits. Even the findings and conclusions of the Commission cover 176 pages. The briefs with accompanying appendixes submitted by the parties contain more than 4,000 pages. The legal questions raised by the Commission and by the different respondents are many and varied. . . .

*Alleged Bias of the Commission.*—One year after the taking of testimony had been concluded and while these proceedings were still pending before the Commission, the respondent Marquette asked the Commission to disqualify itself from passing upon the issues involved. Marquette charged that the Commission had previously prejudged the issues, was “prejudiced and biased against the Portland cement industry generally,” and that the industry and Marquette in particular could not receive a fair hearing from the Commission. After hearing oral argument the Commission refused to disqualify itself. This contention, repeated here, was also urged and rejected in the Circuit Court of Appeals one year before that court reviewed the merits of the Commission’s order. *Marquette Cement Mfg. Co. v. Federal Trade Commission*, 147 F. (2d) 589.

Marquette introduced numerous exhibits intended to support its charges. In the main these exhibits were copies of the Commission’s reports made to Congress or to the President, as required by § 6 of the Trade Commission Act. 15 USC § 46. These reports, as well as the testimony given by members of the Commission before congressional committees, make it clear that long before the filing of this complaint the members of the Commission at that time, or at least some of them, were of the opinion that the operation of the multiple basing point system as they had studied it was the equivalent of a price fixing restraint of trade in violation of the Sherman Act. We therefore decide this contention, as did the Circuit Court of Appeals, on the assumption that such an opinion had been formed by the entire membership of the Commission as a result of its prior official investigations. But we also agree with that court’s holding that this belief did not disqualify the Commission.

In the first place, the fact that the Commission had entertained such views as the result of its prior *ex parte* investigations did not necessarily mean that the minds of its members were irrevocably closed on the subject of the respondents’ basing point practices. Here, in contrast to the Commission’s investigations, members of the cement industry were legally authorized participants in the hearings. They produced evidence—volumes of it. They were free to point out to the Commission by testimony, by cross-examination of witnesses, and by arguments, conditions of the trade practices under attack which

they thought kept these practices within the range of legally permissible business activities.

Moreover, Marquette's position, if sustained, would to a large extent defeat the congressional purposes which prompted passage of the Trade Commission Act. Had the entire membership of the Commission disqualified in the proceedings against these respondents, this complaint could not have been acted upon by the Commission or by any other government agency. Congress has provided for no such contingency. It has not directed that the Commission disqualify itself under any circumstances, has not provided for substitute commissioners should any of its members disqualify, and has not authorized any other government agency to hold hearings, make findings, and issue cease and desist orders in proceedings against unfair trade practices. Yet if Marquette is right, the Commission, by making studies and filing reports in obedience to congressional command, completely immunized the practices investigated, even though they are "unfair," from any cease and desist order by the Commission or any other governmental agency.

There is no warrant in the Act for reaching a conclusion which would thus frustrate its purposes. If the Commission's opinions expressed in congressionally required reports would bar its members from acting in unfair trade proceedings, it would appear that opinions expressed in the first basing point unfair trade proceeding would similarly disqualify them from ever passing on another. See *Morgan v. United States*, 313 U. S. 409, 421, 85 L. Ed. 1429, 61 S. Ct. 999. Thus experience acquired from their work as commissioners would be a handicap instead of an advantage. Such was not the intentment of Congress. For Congress acted on a committee report stating: "It is manifestly desirable that the terms of the commissioners shall be long enough to give them an opportunity to acquire the expertness in dealing with these special questions concerning industry that comes from experience." Report of Committee on Interstate Commerce, No. 597, June 13, 1914, 63d Cong., 2d Sess. 10-11.

Marquette also seems to argue that it was a denial of due process for the Commission to act in these proceedings after having expressed the view that industrywide use of the basing point system was illegal. A number of cases are cited as giving support to this contention. *Tumey v. Ohio*, 273 U. S. 510, 71 L. Ed. 749, 47 S. Ct. 437, 50 A. L. R. 1243, is among them. But it provides no support for the contention. In that case *Tumey* had been convicted of a criminal offense, fined, and committed to jail by a judge who had a direct, personal, substantial, pecuniary interest in reaching his conclusion to convict. A criminal conviction by such a tribunal was held to violate procedural due process. But the Court there pointed out that most matters relating to judicial disqualification did not rise to a constitutional level. *Id.* 273 U. S. at 523.

Neither the Tumey decision nor any other decision of this Court would require us to hold that it would be a violation of procedural due process for a judge to sit in a case after he had expressed an opinion as to whether certain types of conduct were prohibited by law. In fact, judges frequently try the same case more than once and decide identical issues each time, although these issues involve questions both of law and fact. Certainly, the Federal Trade Commission cannot possibly be under stronger constitutional compulsions in this respect than a court.

The Commission properly refused to disqualify itself. We thus need not review the additional holding of the Circuit Court of Appeals that Marquette's objection on the ground of the alleged bias of the Commission was filed too late in the proceedings before that agency to warrant consideration.

### **Personal Bias vs. Emotional Prejudice.**

What is the difference between the type of "bias" involved in the Inland Steel case, and that asserted in the Cement Institute case?

The United States Judicial Code (28 USCA 144) provides that in proceedings before the Federal District Courts, a transfer of the case to another judge may be obtained if a party to the case files a timely and sufficient affidavit that the judge before whom the matter is pending has a "personal bias or prejudice" against him or in favor of an adverse party. The Administrative Procedure Act does not contain any comparable provision, although section 7 (a) does provide that upon the filing of an affidavit alleging personal bias on the part of the hearing officer, the agency shall pass on the question of alleged personal bias as a part of its decision in the case.

Where the question of disqualifying bias is raised, it is necessary to draw a rather fine line of distinction between the personal bias which is disqualifying and a mere predisposition on matters of law or policy, which is not disqualifying. An administrator may properly feel that he has a mission to fulfill; and the fact that his crusading zeal may lead him to a different evaluation of the evidence or a different interpretation of statutory language than would be reached by one entirely indifferent to the result, does not amount to disqualifying bias.

Indeed, one reason for the creation of an administrative agency may sometimes be found in a legislative desire to avoid what might be called a philosophical bias of the courts. Many years ago, one of the reasons urged by a Senate Committee for the creation of the Federal Trade Commission was the fact that Congress did not want the Federal Courts to pass on matters of policy in the field of unfair trade practices. See 51 Cong. Rec. 11384.

Suppose it were shown that when the members of an agency met in conference to consider the evidence which had been taken before a hearing officer, one member said to another: "I hope we can find enough

evidence to make our case stick"; and the member so addressed replied: "I think we can. I'm ready to believe everything that our witnesses testified to." Would that constitute the type of personal bias which disqualifies, or should it be classed as an instance of non-disqualifying emotional bias?

In considering the postulated situation, reference might be had to the decision in *National Labor Relations Board v. Donnelly Garment Co.*, 330 U. S. 219, 91 L. Ed. 854, 67 S. Ct. 756 (1947). In that case, a hearing officer for the agency had excluded a large part of the evidence offered by respondent, and the agency ruled against the respondent. Thereafter, the reviewing court set aside the agency order on the ground that the exclusion of the proffered evidence had been improper. On remand, the agency set the case for rehearing before the same hearing officer. The respondent insisted that this was unfair; that since this officer had prejudged the evidence as valueless, a fair hearing could be achieved only by appointing a new hearing officer. On a second appeal, the reviewing court agreed with this contention. The Supreme Court, however, reversed, and ruled that hearing officers should not be disentitled to sit because they had ruled strongly against a party in the first hearing.

Louis L. Jaffe, writing on "Invective and Investigation in Administrative Law," 52 Harv. L. Rev. 1201, 1219 (1939) suggested: "If emotionally determined values constituted a disqualification, judges would be under constant attack and judicial-constitutional law non-existent. Nor is this entirely a matter of necessary evil. Certain persons give thanks for the predispositions of Mr. Justice Butler and certain others look upon Mr. Justice Holmes' prejudices in favor of free speech as the most precious of safeguards."

Much heat is generated in discussion of the alleged bias of administrative agencies. In evaluating these attacks, it is important to keep in mind the distinction between the type of personal bias and prejudice which is disqualifying (either in the courts or in administrative agencies) and the matter of emotional attitude, or preconception on matters of policy, which (whether exhibited by judges or administrators) is not disqualifying—although some critics of particular agencies believe that it should be.

Some further classification of the several bases of allegedly disqualifying bias may serve to sharpen this line of distinction.

*Personal Prejudice.* If an officer participating in the decision has a personal prejudice against a party to a proceeding before the agency, the agency's action is ordinarily voidable on proper petition. *Narragansett Racing Ass'n, Inc. v. Kiernan*, 59 R. I. 90, 194 Atl. 692 (1937); *Clark v. Alcoholic Beverage Commission*, 54 R. I. 126, 170 Atl. 79 (1934). See Scott, "Administrative Law: Bias of Trial Examiner and Due Process of Law," 30 Geo. L. Jour. 54 (1941); also "The Disqualification of Administrative Officials," 41 Col. L. Rev. 1384 (1941). Frequently

claims based on the asserted prejudice of the administrative officers fail for lack of proof. *Montana Power Co. v. Public Service Commission* (D. C. Mont., 1935), 12 F. Supp. 946; *Georgia Continental Tel. Co. v. Georgia Public Service Commission* (D. C. Ga., 1934), 8 F. Supp. 434.

Suppose a factory employee who was injured while at work consults an attorney, asking him to file a claim under the workmen's compensation law. The attorney declines the retainer, because he is about to assume office as a deputy examiner for the workmen's compensation commission. Thereupon the injured workman retains the services of the law partner of the first attorney. When the case comes on for hearing, it happens to be assigned to the individual who had first been asked to represent claimant and who has now become a deputy examiner. Is he disqualified to sit? *Talbert v. Muskegon Const. Co.*, 305 Mich. 345, 9 N. W. (2d) 572 (1943). Cf. *Colonial Airlines*, 9 C. A. B. 273 (1948), where a son of one of the members of the agency was in the employ of attorneys who appeared as counsel in a case before the agency. Similar questions sometimes arise in judicial proceedings when a judge is related to counsel. See 56 Yale L. Jour. 605 (1947).

Suppose an arbitrator is appointed by a court to settle a labor dispute, and the employer petitions for his removal on the ground that he entertains a disqualifying bias, as shown by the fact that in the past he had strongly urged labor's cause, and had asserted that the interests of labor and management are irreconcilable? See *Western Union Tel. Co. v. Selly* (N. Y. Sup. Ct., 1946), 60 N. Y. S. (2d) 411.

*Pecuniary Interest.* Where a representative of an agency has a direct pecuniary interest in the outcome of a case pending before the agency, he is disqualified to participate in the decision of the case. Where his interest is indirect, the same principle applies, but considerations of de minimis may be invoked where a collateral interest is so insubstantial that it is unlikely it would affect the decision. In *Johnson v. Michigan Milk Marketing Board*, 295 Mich. 644, 295 N. W. 346 (1940) involving an agency empowered to fix prices for milk, it appeared that a majority of the members of the agency were engaged in the business of producing or distributing milk. The agency's order was protested by a distributor whose business methods differed radically from those of the members of the agency. Should the order be held void because of the interest of the agency members in the result? The case is commented on in 89 Penn. L. Rev. 977 (1941).

*Doctrine of Necessity.* Sometimes it happens that the members of the only agency with jurisdiction over a case entertain what would normally be a disqualifying prejudice. The problem then becomes: Should an alleged lawbreaker be allowed to escape trial, or should he be tried, even though he cannot be guaranteed a fair trial (to be sure, the members of the board may be able to act fairly, even though they do entertain a prejudice)? Most courts have decided that in such a case, the

better choice is to uphold the power of the agency to entertain the proceeding. See, e. g., *Marquette Cement Mfg. Co. v. Federal Trade Commission* (CCA 7th, 1945), 147 F. (2d) 589. Sometimes, steps may be taken to reduce the risks involved—for example, a special ad hoc hearing panel may be appointed to hear the evidence and report to the agency.

### Union of Functions of Prosecutor and Judge

**Brinkley v. Hassig, United States Circuit Court of Appeals, 1936. 83 F. (2d) 351. (This case is the sequel to *Brinkley v. Hassig*, 130 Kan. 874, 289 Pac. 64 (1930), ante, p. 260.)**

MCDERMOTT, Circuit Judge. On September 17, 1930, the Kansas State Medical Board revoked the license of Dr. John R. Brinkley to practice medicine and surgery in the state of Kansas. On December 30, 1931, this action was brought to set aside and enjoin such order on the ground that it invaded rights guaranteed by the Federal Constitution. The trial court, after a long trial, dismissed the bill on its merits on July 15, 1935. This is an appeal from that order. . . .

The principal contention now made is that the members of the board were prejudiced against appellant before the hearing started, and that some of them were active in instigating the complaint. Without detailing the evidence, it does appear that some of the board had expressed such prejudice, and doubtless all were in fact prejudiced. Dr. Hassig was president of the board. He was also secretary of the Medical Society, in which latter capacity he served as the intermediary through whom complaints were cleared, very much as the secretary of the State Bar Board receives complaints against lawyers, corresponds about them, and if a complaint is filed, sits as a member of the board. One of the board, after listening to testimony for three days, said he was ready to vote. The president told him that no vote could be cast until all the testimony was in. The impatient member assented, and resumed his task.

The spectacle of an administrative tribunal acting as both prosecutor and judge has been the subject of much comment, and efforts to do away with such practice have been studied for years. The Board of Tax Appeals is an outstanding example of one such successful effort. But it has never been held that such procedure denies constitutional right. On the contrary, many agencies have functioned for years, with the approval of the courts, which combine these roles. The Federal Trade Commission investigates charges of business immorality, files a charge in its own name as plaintiff, and then decides whether the proof sustains the charges it has preferred. The Interstate Commerce Commission and state Public Service Commissions may prefer complaints to be tried before themselves. If an administrative tribunal may on its own initiative investigate, file a complaint, and then try the charge so pre-

ferred, due process is not denied here because one or more members of the board aided in the investigation.

The publicity used by appellant made public prejudice well-nigh inevitable. At any moment the program on the radio might change from cowboy songs to the diagnosis of disease and the extolling of the compound operation. That the members of the board had radios in their homes is no constitutional disqualification. The unusual thing about this case is that one issue to be tried was whether such radio talks were in fact given and whether they violated professional standards of conduct. Members of the board having radios thus had personal knowledge of the fact alleged, and necessarily formed some opinion as to whether they were in conflict with professional standards.

Assuming such preconceived prejudice, what is the answer? The statute provides but one tribunal with power to revoke a doctor's license, just as the Supreme Court of Kansas is the only body with power to disbar a lawyer. If such powers may not be exercised if the members of the board or court are prejudiced, then any lawyer or doctor who commits an offense so grave that it shocks every right-thinking person, has an irrevocable license to practice his profession if he can get the news of his offense to the court or board before the trial begins. That will not do. The commendable efforts of the medical and legal professions to raise the standards of their professions by cleaning their own houses cannot be set as naught by any such rule of law.

From the very necessity of the case has grown the rule that disqualification will not be permitted to destroy the only tribunal with power in the premises. If the law provides for a substitution of personnel on a board or court, or if another tribunal exists to which resort may be had, a disqualified member may not act. But where no such provision is made, the law cannot be nullified or the doors to justice barred because of prejudice or disqualification of a member of a court or an administrative tribunal. In *Evans v. Gore*, 253 U. S. 245, 40 S. Ct. 550, 64 L. Ed. 887, 11 A. L. R. 519, a question arose in which the members of the court had a direct personal financial interest. Adverting to this regretful circumstance, the court declined to renounce jurisdiction which appellant was entitled to invoke since "there was no other appellate tribunal to which under the law he could go." Cases have arisen where all the members of state Supreme Courts have been jointly sued by disappointed litigants; confronted with the choice of denying the suitor his right of appeal or hearing it themselves, the courts have heard the appeal. An exhaustive note gathering and analyzing the cases from twelve states and from England and Canada may be found in 39 A. L. R. 1476. Other authorities may be found in 42 L. R. A. (N. S.) 788, L. R. A. 1915 E, p. 858, and in 33 C. J. 989, and 15 R. C. L. 541. In *Stahl v. Board of Sup'rs*, 187 Iowa 1342, 175 N. W. 772, 777, 11 A. L. R. 185, the court suggested that one so disqualified might

resign. But the law does not require a member of a court or a tribunal to resign his position because of an isolated case where he must act although interested. The trial court, after patiently hearing the evidence as to the attitude of mind of the individual members, disposed of the contention in this language with which we are in accord:

"Under the general terms of the statute, the Medical Board is empowered to protect the public against conduct which is clearly against public interests and therefore necessarily unprofessional, the same as if the legislature had specifically denounced and prohibits such practice. The members of the board were not disqualified because they knew of his methods prior to the hearing and condemned them. John R. Brinkley's methods were so notorious that ignorance of them by members of the board was an impossibility and such knowledge compelled condemnation." . . .

The decree accordingly is affirmed.<sup>3</sup>

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<sup>3</sup> Compare with the principal case, *Stockwell v. Township Board of White Lake*, 22 Mich. 341 (1871), holding that a proceeding for removal of an officer from office is "judicial," and, therefore, an interest in the subject of the complaint on the part of one of the members of the tribunal renders the order void. The interest in this case arose from the fact that the officer being removed had refused to approve certain bills for payment, including one alleged to be owing to one of the members of the tribunal which passed upon the removal.

Another decision, in which the union of the functions of prosecution and decision in the same hand was held ground for disqualification, is *Abrams v. Jones*, 35 Idaho 532, 207 Pac. 724 (1922). The case involved the revocation of a dentist's license. The committee of dentists which preferred charges against Abrams also sat as the tribunal to pass on the question of revocation. Under the statutes the tribunal did not actually issue the removal order, but it made its recommendations to the State Commissioner who in turn ordered the license revoked. The court felt that the hearing under the circumstances could not be deemed to satisfy the requirements of due process of law. On the principal point at issue the court said:

"Finally it appears that the hearing involved in this case was ordered upon the written report and recommendation of the dental examining committee, that it was held before the committee, and that they recommended to the Commissioner the revocation of respondent's license. It would also seem from the communication addressed to respondent that the charges contained in the Commissioner's letter were formulated by the dental examining committee, while C. S., § 2130, provides *inter alia*, that: 'In prescribing procedure for the determination of the truth or falsity of any charge against a licensee, having for its purpose the revocation of his license or certificate of registration, . . . the department, upon written complaint by any licensed dentist, shall use reasonable means to establish the truth or falsity of such charge and for that purpose may make such expenditures as are necessary.'

"C. S., § 2118, clothes the department of law enforcement with power to conduct hearings on proceedings to revoke licenses of persons practicing dentistry, but due process of law and every consideration of justice demand that such hearing should be a fair and impartial hearing before a body which has not already decided the controversy. Here we have the anomalous situa-



### English Views Concerning the Prosecutor and the Tribunal Being One and the Same.

The principle that one shall not be judge in his own cause is deeply rooted in all systems of jurisprudence. The English courts have adhered to it with strictness and have vitiated decisions rendered by quasi-judicial bodies when one or more of the members of the tribunal were connected with the prosecutions. *Frome United Breweries Co., Ltd. v. Justices for County Borough of Bath*, [1926] A. C. 586; *Queen*

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tion of a committee of ethical dentists, who are empowered to investigate the affairs of other members of their profession, upon written complaint of any licensed dentist, to make such expenditures of public moneys as may be necessary to that end, to prefer charges against dentists whom they regard as guilty of violations of the dental law, and then under the semblance of a hearing to sit in judgment upon and to condemn the accused. This dual role of the dental examining committee as both prosecutor and judge is repugnant to the spirit of American law, a fundamental principle of which is that no man shall be deprived of life, liberty or property without due process of law, and as was said in *Re Cameron*, 126 Tenn. 614, 151 S. W. 64, at 76: 'Beyond question it is not according to due process of law to compel a man over his protest to try his case before a judge who has already decided it, and has announced that decision in advance of the hearing. It is equally true that such compulsion is a denial of justice.'

'Due process of law is not necessarily satisfied by any process which the legislature may by law provide, but by such process only as safeguards and protects the fundamental, constitutional rights of the citizen. Where the state confers a license upon an individual to practice a profession, trade or occupation, such license becomes a valuable personal right which cannot be denied or abridged in any manner except after due notice and a fair and impartial hearing before an unbiased tribunal.

'We are bound to assume that in preferring the charges against respondent the dental examining committee had reasonable ground to believe that the charges were true, or, in other words, that they had received evidence which appeared to justify the revocation of respondent's license under the dental law. It would then be manifestly unfair to require respondent to submit himself to a hearing before the committee, which had at least tentatively prejudged the matter as evidenced by the charges which it had brought against respondent. The committee was clearly disqualified, both in law and in fact, to give respondent a fair and impartial hearing, and this is the only hearing known to the law. It is of the highest importance that the actions, not only of the courts but also of all other governmental agencies, should be free from reproach or the suspicion of unfairness. We attribute only the highest motives to the commissioner and the members of the committee. Nevertheless the fact remains that respondent was entitled to a hearing before an impartial body, and this right was denied when he was required to submit himself before a body which was at once his accuser, prosecutor and judge.

'In *Broom's Legal Maxims*, 8th Ed., pp. 94-99, it is said: 'It is a fundamental rule in the administration of justice that a person cannot be judge in a case where he is interested. . . . And therefore in the reign of James I it was solemnly adjudged that the king cannot take any cause, whether civil or criminal, out of any of his courts and give judgment on it himself. . . . And it is a maxim of law that no man can be at once judge and suitor.' "

v. London County Council, [1892] 1 Q. B. 190. See Robson, "Justice and Administrative Law," pp. 58-66.

In the Frome United Breweries case *supra*, VISCOUNT CANE, L. C., holding invalid a revocation of a license by the authorities because some of the members of the tribunal had aided the prosecution said, "If there is one principle which forms an integral part of the English law, it is that every member of a body engaged in a judicial proceeding must be able to act judicially; and it has been held over and over again that, if a member of such a body is subject to a bias (whether financial or other) in favor of or against either party to a dispute he is in such a position that a bias must be assumed, he ought not to take part in the decision or even sit upon the tribunal. This rule has been asserted not only in the case of courts of justice and other judicial tribunals, but in the case of authorities which, though in no sense to be called courts, have to act as judges of the rights of others. . . . From the above rule it necessarily follows that a member of such a body as I have described cannot be both a party and a judge in the same dispute, and that if he has made himself a party he cannot sit or act as judge, and if he does so the decision of the whole body will be vitiated."

**Recommendation of Hoover Commission Task Force on Legal Services and Procedure, 1955 (Report, p. 176).**

#### RECOMMENDATION NO. 41

*Internal separation of functions should be extended to all adjudicatory proceedings, including the process of final decision by agency heads, aided by special review staffs or personnel.*

##### The Problem.

A principal characteristic of the administrative process is the concentration in a single instrumentality of investigatory, prosecuting, and adjudicatory functions. Regulatory agencies like the Securities and Exchange Commission control and police various phases of interstate commerce under comprehensive legislative charters. Within such agencies the power to initiate an investigation and complaint is united with the power to determine whether the facts found after hearing warrant the imposition of a penalty or other legal consequences.

This concentration of functions tends to depart from the traditional principle that no one shall be a judge in his own cause. The practical aspects of the problem were stated by three members of the Attorney General's Committee on Administrative Procedure, Sen. Doc. 8, 77th Cong., 1st Session 204 (1941):

In the administrative process . . . these stages of making and applying law have been telescoped into a single agency. In this concentration customary and separate procedures have disappeared. The legislature no longer prescribes the rules but in large part leaves this function to the administrative agency. . . . The agency which prescribes rules is also the investigator, the prosecutor, the judge, and to a large extent the appellate tribunal. It is given a staggering load of work and must necessarily delegate many of these functions to subordinates. One employee acts as prosecutor, another as presiding judge, and another as

appellate judge. There is no jury. The litigant often feels that, in this combination of functions within a single tribunal or agency, he has lost all opportunity to argue his case to an unbiased official and that he has been deprived of safeguards he has been taught to revere.

By internal separation of powers is meant an arrangement within an agency designed to prevent the contamination of judging by other inconsistent functions. The basic objective is to maintain the integrity of, and public confidence in, case adjudication affecting private rights. The agency employee who investigates should play no further role in such proceedings than that of witness. The legal staff members who present evidence on behalf of the agency should not participate in the ultimate decision of the case. The officer who presides at the hearing can exercise his independent judgment on the evidence only if he is insulated against agency and staff influence. The agency members should exercise their judgment on the written record without consultation with those who investigated, prosecuted, and heard the case below. These are the fundamental objectives of internal separation of functions vital to the protection of private rights.

### **Should Prosecutor-Judge Functions Be Combined?**

The question as to the desirability of combining prosecuting and judicial functions in a single agency has had a long and contentious history.

It has been urged that such combination is desirable even from the viewpoint of respondent; because, it is said, a prosecuting agency, without the sobering responsibility of having to pass judgment, would start prosecutions recklessly, if there were any suspicion of guilt. In reply, it is argued that no such untoward results have been observed in agencies (such as the Wage Hour Division of the Department of Labor) which have only prosecuting powers.

In favor of combining powers, it is urged that rigid separation of functions would interfere with informal settlement of cases. As opposed to this, it is argued that experience has not borne out such fears—that the Department of Justice, for example, settles many cases rather than going into court to try them.

The debate waxes hottest on the topic of internal separation of functions, as contemplated by Section 5 (c) of the Federal Administrative Procedure Act. For a comprehensive statement of contrasting views on this question, compare the statement of the majority of the Attorney General's Committee with that of the dissenting members of the same committee. "Administrative Procedure in Government Agencies," Sen. Doc. 8, 77th Cong., 1st Session (1941), pp. 55-60 (majority), and pp. 203-209 (dissent). The suggestion has been made that while internal separation is sufficient in simple cases of license applications, or applications for social security benefits, yet it is inadequate in the fields occupied by such agencies as the Federal Trade Commission and National Labor Relations Board, where the agency concentrates its energies on preventing certain types of activity and where the judicial question

to be determined is whether the agency is justified in its charges that respondent has engaged in a proscribed activity.

The field of rate-making presents peculiar problems. It has been urged that since the inquiry in rate cases is not primarily judicial, it is desirable that the members of the agency participate actively in all phases of investigation and determination. Is the argument sound?

There has been an interesting history of development toward separation of functions. Often, as an agency grows into maturity, it becomes a separate court, losing its prosecuting functions. Thus, adjudicatory functions of the Customs Bureau came after a time to be vested in a Customs Court. Similarly, the responsibilities of the Bureau of Internal Revenue in passing administratively on claims for refunds or objections to tax assessments were in later years vested in a separate Board of Tax Appeals which in due course became a Tax Court. The Court of Claims had similar origins. Do these examples indicate that, in fields where administrative agencies engage contentiously with the private parties appearing before them, it is in the interest of good government gradually to eliminate the prosecutor-judge combination?

### **Opportunity to Learn Nature of Charge and to Meet Agency's Case**

**Morgan v. United States, Supreme Court of the United States, 1938.  
304 U. S. 1, 82 L. Ed. 1129, 58 S. Ct. 773.**

MR. CHIEF JUSTICE HUGHES delivered the opinion of the court.

This case presents the question of the validity of an order of the Secretary of Agriculture fixing maximum rates to be charged by market agencies at the Kansas City Stockyards. Packers and Stockyards Act 1921, 42 Stat. 159; 7 USC §§ 181-229, 7 USCA § 181 et seq. The District Court of three judges dismissed the bills of complaint in fifty suits (consolidated for hearing) challenging the validity of the rates, and the plaintiffs bring this direct appeal. 7 USC § 217, 7 USCA § 217; 28 USC § 47, 28 USCA § 47.

The case comes here for the second time. On the former appeal we met, at the threshold of the controversy, the contention that the plaintiffs had not been accorded the hearing which the statute made a prerequisite to a valid order. The District Court had struck from plaintiff's bills the allegations that the Secretary had made the order without having heard or read the evidence and without having heard or considered the arguments submitted, and that his sole information with respect to the proceeding was derived from consultation with employees in the Department of Agriculture. We held that it was error to strike these allegations, that the defendant should be required to answer them, and that the question whether plaintiffs had a proper hearing should be determined. 298 U. S. 468, 56 S. Ct. 906, 80 L. Ed. 1288.

After the remand, the bills were amended and interrogatories were directed to the Secretary which he answered. The court received the

evidence which had been introduced at its previous hearing, together with additional testimony bearing upon the nature of the hearing accorded by the Secretary. This evidence embraced the testimony of the Secretary and of several of his assistants. The District Court rendered an opinion, with findings of fact and conclusions of law, holding that the hearing before the Secretary was adequate and on the merits, that his order was lawful. On this appeal, plaintiffs again contend (1) that the Secretary's order was made without the hearing required by the statute; and (2) that the order was arbitrary and unsupported by substantial evidence.

The first question goes to the very foundation of the action of administrative agencies intrusted by the Congress with broad control over activities which in their detail cannot be dealt with directly by the Legislature. The vast expansion of this field of administrative regulation in response to the pressure of social needs is made possible under our system by adherence to the basic principles that the Legislature shall appropriately determine the standards of administrative action and that in administrative proceedings of a quasi-judicial character the liberty and property of the citizen shall be protected by the rudimentary requirements of fair play. These demand "a fair and open hearing,"—essential alike to the legal validity of the administrative regulation and to the maintenance of public confidence in the value and soundness of this important governmental process. Such a hearing has been described as an "inexorable safeguard." *St. Joseph Stock Yards Co. v. United States*, 298 U. S. 38, 73, 56 S. Ct. 720, 735, 80 L. Ed. 1033; *Ohio Bell Telephone Co. v. Public Utilities Commission*, 301 U. S. 292, 304, 305, 57 S. Ct. 724, 730, 81 L. Ed. 1093; *Railroad Commission of California v. Pacific Gas & Electric Co.*, 302 U. S. 388, 393, 58 S. Ct. 334, 338, 82 L. Ed. 319; *Morgan v. United States*, *supra*. And in equipping the Secretary of Agriculture with extraordinary powers under the Packers and Stockyards Act, the Congress explicitly recognized and emphasized this requirement by making his action depend upon a "*full hearing*." Section 310.<sup>4</sup>

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<sup>4</sup> Section 310 of the Packers and Stockyards Act, 42 Stat. 159, 166; 7 USC 211, provides:

"Whenever after full hearing upon a complaint made as provided in section 309 (210 of this chapter) or after full hearing under an order for investigation and hearing made by the Secretary on his own initiative, either in extension of any pending complaint or without any complaint whatever, the Secretary is of the opinion that any rate, charge, regulation, or practice of a stockyard owner or market agency, for or in connection with the furnishing of stockyard services, is or will be unjust, unreasonable, or discriminatory, the Secretary—

"(a) May determine and prescribe what will be the just and reasonable rate or charge, or rates or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what regulation or practice is or will be just, reasonable, and nondiscriminatory to be thereafter followed."

In the record now before us the controlling facts stand out clearly. The original administrative proceeding was begun on April 7, 1930, when the Secretary of Agriculture issued an order of inquiry and notice of hearing with respect to the reasonableness of the charges of appellants for stockyards services at Kansas City. The taking of evidence before an examiner of the Department was begun on December 3, 1930, and continued until February 10, 1931. The government and appellants were represented by counsel, and voluminous testimony and exhibits were introduced. In March, 1931, oral argument was had before the Acting Secretary of Agriculture and appellants submitted a brief. On May 18, 1932, the Secretary issued his findings and an order prescribing maximum rates. In view of changed economic conditions, the Secretary vacated that order and granted a rehearing. That was begun on October 6, 1932, and the taking of evidence was concluded on November 16, 1932. The evidence received at the first hearing was resubmitted, and this was supplemented by additional testimony and exhibits. On March 24, 1933 oral argument was had before Rexford G. Tugwell as Acting Secretary.

It appears that there were about 10,000 pages of transcript of oral evidence and over 1,000 pages of statistical exhibits. The oral argument was general and sketchy. Appellants submitted the brief which they had presented after the first administrative hearing and a supplemental brief dealing with the evidence introduced upon the rehearing. No brief was at any time supplied by the government. Apart from what was said on its behalf in the oral argument, the government formulated no issues and furnished appellants no statement or summary of its contentions and no proposed findings. Appellants' request that the examiner prepare a tentative report, to be submitted as a basis for exception and argument was refused.

Findings were prepared in the Bureau of Animal Industry, Department of Agriculture, whose representatives had conducted the proceedings for the government, and were submitted to the Secretary who signed them, with a few changes in the rates, when his order was made on June 14, 1933. These findings, 180 in number, were elaborate. They dealt with the practices and facilities at the Kansas City livestock market, the character of appellants' business and services, their rates and the volume of their transactions, their gross revenues, their methods in getting and maintaining business, their joint activities, the economic changes since the year 1929, the principles which governed the determination of reasonable commission rates, the classification of cost items, the reasonable unit costs plus a reasonable amount of profits to be covered into reasonable commission rates, the reasonable amounts to be included for salesmanship, yarding salaries and expenses, office salaries and expenses, business getting and maintaining expenses, administrative and general expenses, insurance, interest on capital, and profits, together

with summary and the establishment of the rate structure. Upon the basis of the reasonable costs as thus determined, the Secretary found that appellants' schedules of rates were unreasonable and unjustly discriminatory, and fixed the maximum schedules of the just and reasonable rates thereafter to be charged.

No opportunity was afforded to appellants for the examination of the findings thus prepared in the Bureau of Animal Industry until they were served with the order. Appellants sought a rehearing by the Secretary, but their application was denied on July 6, 1933, and these suits followed.

The part taken by the Secretary himself in the departmental proceedings is shown by his full and candid testimony. The evidence had been received before he took office. He did not hear the oral argument. The bulky record was placed upon his desk and he dipped into it from time to time to get its drift. He decided that probably the essence of the evidence was contained in appellants' briefs. These, together with the transcript of the oral argument, he took home with him and read. He had several conferences with the Solicitor of the Department and with the officials in the Bureau of Animal Industry, and discussed the proposed findings. He testified that he considered the evidence before signing the order. The substance of his action is stated in his answer to the question whether the order represented his independent conclusion, as follows: "My answer to the question would be that that very definitely was my independent conclusion as based on the findings of the men in the Bureau of Animal Industry. I would say, I will try to put it as accurately as possible, that it represented my own independent reactions to the findings of the men in the Bureau of Animal Industry."

Save for certain rate alterations, he "accepted the findings."

In the light of this testimony there is no occasion to discuss the extent to which the Secretary examined the evidence, and we agree with the government's contention that it was not the function of the court to probe the mental processes of the Secretary in reaching his conclusions if he gave the hearing which the law required. The Secretary read the summary presented by appellants' briefs and he conferred with his subordinates who had sifted and analyzed the evidence. We assume that the Secretary sufficiently understood its purport. But a "full hearing"—a fair and open hearing—requires more than that. The right to a hearing embraces not only the right to present evidence, but also a reasonable opportunity to know the claims of the opposing party and to meet them. The right to submit argument implies that opportunity; otherwise the right may be but a barren one. Those who are brought into contest with the government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the government proposes and to be heard upon its proposals before it issues its final command.

No such reasonable opportunity was accorded appellants. The administrative proceeding was initiated by a notice of inquiry into the reasonableness of appellants' rates. No specific complaint was formulated and, in a proceeding thus begun by the Secretary on his own initiative, none was required. Thus, in the absence of any definite complaint, and in a sweeping investigation, thousands of pages of testimony were taken by the examiner and numerous complicated exhibits were introduced bearing upon all phases of the broad subject of the conduct of the market agencies. In the absence of any report by the examiner or any findings proposed by the government, and thus without any concrete statement of the government's claims, the parties approached the oral argument.

Nor did the oral argument reveal these claims in any appropriate manner. The discussion by counsel for the government was "very general," as he said, in order not to take up "too much time." It dealt with generalities both as to principles and procedure. Counsel for appellants then discussed the evidence from his standpoint. The government's counsel closed briefly, with a few additional and general observations. The oral argument was of the sort which might serve as a preface to a discussion of definite points in a brief, but the government did not submit a brief. And the appellants had no further information of the government's concrete claims until they were served with the Secretary's order.

Congress, in requiring a "full hearing" had regard to judicial standards—not in any technical sense but with respect to those fundamental requirements of fairness which are of the essence of due process in a proceeding of a judicial nature. If in an equity cause, a special master or the trial judge permitted the plaintiff's attorney to formulate the findings upon the evidence, conferred *ex parte* with the plaintiff's attorney regarding them, and then adopted his proposals without affording an opportunity to his opponent to know their contents and present objections, there would be no hesitation in setting aside the report or decree as having been made without a fair hearing. The requirements of fairness are not exhausted in the taking or consideration of evidence, but extend to the concluding parts of the procedure as well as to the beginning and intermediate steps.

The answer that the proceeding before the Secretary was not of an adversary character, as it was not upon complaint but was initiated as a general inquiry, is futile. It has regard to the mere form of the proceeding and ignores realities. In all substantial respects, the government acting through the Bureau of Animal Industry of the Department was prosecuting the proceeding against the owners of the market agencies. The proceeding had all the essential elements of contested litigation, with the government and its counsel on the one side and the appellants and their counsel on the other. It is idle to say that this



was not a proceeding in reality against the appellants when the very existence of their agencies was put in jeopardy. Upon the rates for their services the owners depended for their livelihood and the proceeding attacked them at a vital spot. This is well shown by the fact that, on the merits, appellants are here contending that under the Secretary's order many of these agencies, although not found to be inefficient or wasteful, will be left with deficits instead of reasonable compensation for their services, and will be compelled to go out of business. And to this the government responds that if as a result of the prescribed rates some agencies may be unable to continue, because through existing competition there are too many, that fact will not invalidate the order. While we are not now dealing with the merits, the breadth of the Secretary's discretion under our rulings applicable to such a proceeding, *Tagg Bros. & Moorhead v. United States*, 280 U. S. 420, 50 S. Ct. 220, 74 L. Ed. 524; *Acker v. United States*, 298 U. S. 426, 56 S. Ct. 824, 80 L. Ed. 1257, places in a strong light the necessity of maintaining the essentials of a full and fair hearing, with the right of the appellants to have a reasonable opportunity to know the claims advanced against them as shown by the findings proposed by the Bureau of Animal Industry.

Equally unavailing is the contention that the former Secretary of Agriculture had made an order in May, 1932, containing findings of fact and fixing a schedule of rates, of which appellants were apprised. Because of changes in economic conditions, the Secretary himself had set aside that order and directed a rehearing. This necessarily involved, as the Secretary found, a consideration "of changes both general and particular" which had "occurred since the year 1929" and brought up all the questions pertinent to the new situation to which the additional evidence upon the rehearing was directed. The former findings and order were no longer in effect, and it is with the conduct of the later proceeding that we are concerned.

The government adverts to an observation in our former opinion that, while it was good practice—which we approved—to have the examiner, receiving the evidence in such a case, prepare a report as a basis for exceptions and argument, we could not say that that particular type of procedure was essential to the validity of the proceeding. That is true, for, as we said, what the statute requires "relates to substance and not form." Conceivably, the Secretary in a case the narrow limits of which made such a procedure practicable, might himself hear the evidence and the contentions of both parties and make his findings upon the spot. Again, the evidence being in, the Secretary might receive the proposed findings of both parties, each being notified of the proposals of the other, hear argument thereon, and make his own findings. But what would not be essential to the adequacy of the hearing if the Secretary himself makes the findings is not a criterion for a case in which the Secretary accepts and makes as his own the findings which have

been prepared by the active prosecutors for the government, after an ex parte discussion with them and without according any reasonable opportunity to the respondents in the proceeding to know the claims thus presented and to contest them. That is more than an irregularity in practice; it is a vital defect.

The maintenance of proper standards on the part of administrative agencies in the performance of their quasi-judicial functions is of the highest importance and in no way cripples or embarrasses the exercise of their appropriate authority. On the contrary, it is in their manifest interest. For, as we said at the outset, if these multiplying agencies deemed to be necessary in our complex society are to serve the purposes for which they are created and endowed with vast powers, they must accredit themselves by acting in accordance with the cherished judicial tradition embodying the basic concepts of fair play.

As the hearing was fatally defective, the order of the Secretary was invalid. In this view, we express no opinion upon the merits. The decree of the District Court is reversed.

It is so ordered.

Reversed.

MR. JUSTICE BLACK dissents.<sup>5</sup>

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<sup>5</sup> The Morgan cases have occasioned much comment in legal literature. See Doyle, "Federal Administrative Hearings: Significance of the Morgan Case," 19 Neb. L. Bull. 125 (1940); Dugan, "A New Administrative Landmark," 27 Geo. L. Jour. 351 (1939); Feller, "Prospectus for Further Study of Federal Administrative Law," 47 Yale L. Jour. 647 (1938); Sears, "The Morgan Case and Administrative Procedure," 7 Geo. Wash. L. Rev. 726 (1939); Pearlman, "The Effect of the Morgan Decisions on the Position of the Trial Examiner," 10 Geo. Wash. L. Rev. 43 (1941); Mendelson, "Some Administrative Implications of the Morgan Decisions," 30 Ky. L. J. 408 (1942); and Comment, "Requirements of 'Full Hearing,'" 37 Mich. L. Rev. 597 (1939).

Section 5(a) of the Federal Administrative Procedure Act requires that the notice used in initiating adjudicatory proceedings shall state the "matters of fact and law asserted." This leaves unanswered many questions as to the degree of specificity which will be required. The Hoover Commission Task Force on Legal Services and Procedure has recommended (Report, p. 366—1955) that this section be amended to require compliance, to the extent practicable, with the practice and requirements of pleading in the United States district courts.

One cause of difficulty is that the agency sometimes finds it impracticable to specify its claims with particularity, because when the proceeding is instituted, the agency is not sure what its claims will be. Thus, in *Tagg Bros. & Moorhead v. United States*, 280 U. S. 420, 74 L. Ed. 524, 50 S. Ct. 220 (1930), where market agencies had filed proposed tariff schedules increasing their rates, and the administrative authorities, after suspending the proposed rate schedules, gave notice that at statutory hearings they would consider whether a further order should be made as to the rates, it was held that this sufficiently apprised the parties of the possibility that the administrative authorities might prescribe a new schedule of rates even lower than those under which the petitioners had been operating before the increase was

## He Who Decides Must Hear

**Morgan v. United States, Supreme Court of the United States, 1936.  
298 U. S. 468, 80 L. Ed. 1288, 56 S. Ct. 906.**

MR. CHIEF JUSTICE HUGHES delivered the opinion of the court.

These are fifty suits, consolidated for the purpose of trial, to restrain the enforcement of an order of the Secretary of Agriculture, fixing the

proposed. In *Pearson v. Walling* (CCA 8th, 1943), 138 F. (2d) 655, the Administrator of the Wage and Hour Division had published general notice of meetings to be held by an "Industry Committee," which would be charged in part with the duty of defining the "Lumber and Timber Products" industry. The definition promulgated was broad enough to include manufacturers of bows and arrows. It was held that there was no deprivation of due process because a manufacturer engaged in that particular business had not been apprised in advance that the definition might be made so broad. On the other hand, in *Carl Zeiss, Inc. v. United States* (C. C. P. A. 1935), 76 F. (2d) 412, it was held that a notice of a hearing concerning "optical instruments of a class or type used by Army, Navy or . . . Air Forces for fire control" was not broad enough to support an order referring to instruments of a type "suitable to be used" for such purposes.

Some of the state courts have been more inclined to insist on definiteness and particularity in administrative pleadings than are the federal courts, e. g., *Abrams v. Daugherty*, 60 Cal. App. 297, 212 Pac. 942 (1922); *Kalman v. Walsh*, 355 Ill. 341, 189 N. E. 315 (1934).

The right to meet the agency's case includes not only the requirement of fair advance notice, but also an opportunity to meet the evidence offered by the agency. Section 5(a) of the Federal Administrative Procedure Act requires that "due regard shall be had" for the convenience and necessity of the parties in fixing the time and place of hearing. See *National Labor Relations Board v. Prettyman* (CCA 6th, 1941), 117 F. (2d) 786.

Section 7(c) of the Federal Administrative Procedure Act provides that every party shall have the right to conduct such cross-examination of witnesses "as may be required for a full and true disclosure of the facts." In *Reilly v. Pinkus*, 338 U. S. 269, 94 L. Ed. 63, 70 S. Ct. 110 (1949), it was held that deprival of cross-examination resulted in denial of a fair trial. Cf. *National Labor Relations Board v. Milco Undergarment Co., Inc.* (CA 3rd, 1954), 212 F. (2d) 801.

Closely related questions are involved where the agency's decision rests on tests, inspections or examinations. How is respondent to be granted an opportunity to rebut the agency's tentative conclusions, in such cases? The Hoover Commission Task Force on Legal Services and Procedure made the following suggestion (Report, p. 186—1955):

"Inspections, tests, and examinations play an important and sometimes a vital role in the performance of agency functions. Their results usually affect, and are sometimes completely determinative of, the rights and duties of interested parties in adjudication, rule making, licensing, proprietary matters, the seizure or condemnation of property, and the institution of criminal prosecutions. . . . It is essential, therefore, that procedures be adopted to assure the accuracy of inspections, tests, and examinations, both for the protection of members of the public and for the elimination of unnecessary proceedings before administrative agencies and in the courts.

"Procedural safeguards are now provided for certain inspections. For

maximum rates to be charged by market agencies for buying and selling livestock at the Kansas City Stock Yards. Packers and Stockyards Act, 1921, 42 Stat. 159; 7 USCA §§ 181-229.

The proceeding was instituted by an order of the Secretary of Agriculture in April, 1930, directing an inquiry into the reasonableness of existing rates. Testimony was taken and an order prescribing rates followed in May, 1932. An application for rehearing, in view of changed economic conditions, was granted in July, 1932. After the taking of voluminous testimony, which was concluded in November, 1932, the order in question was made on June 14, 1933. Rehearing was refused on July 6, 1933.

Plaintiffs then brought these suits attacking the order, so far as it prescribed maximum charges for selling livestock, as illegal and arbitrary and as depriving plaintiffs of their property without due process of law in violation of the Fifth Amendment of the Constitution. The District Court of three judges entered decrees sustaining the order and dismissing the bills of complaint. 8 F. Supp. 766. Motions for rehearing were denied and, by stipulation, the separate decrees were set aside and a joint and final decree was entered to the same effect. Plaintiffs bring this direct appeal. 7 USCA § 217; 28 USCA § 47.

On the merits, plaintiffs assert that the ultimate basis for the reduction in commission rates is the Secretary's opinion that there are too many market agencies, too many salesmen, and too much competition in the business; that the Secretary has departed entirely from the evidence as to the actual cost of employing salesmen in selling cattle at

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example, if a locomotive inspector of the Interstate Commerce Commission believes that unsafe conditions exist and gives notice thereof, a re-inspection by another inspector must be conducted upon appropriate application therefor, see 45 USC § 29 (1952). The rules of the Department of Agriculture allow applications to be made to obtain a re-inspection for the purpose of grading grain, 7 Code Fed. Regs. § 26.25 (1953 Rev.). Grain inspectors are also required to maintain adequate records of the grain graded by them which shall be open for inspection by any grain supervisor, 7 Code Fed. Regs. § 26.40 (1953 Rev.).

"Emergency situations, of course, justify prompt action upon inspection by an officer of an agency. For example, if an inspector of the Bureau of Mines, Department of the Interior, believes that a dangerous condition exists in a mine, he immediately issues an order for the withdrawal of all but certain designated classes of persons from the area, see 30 USC § 473 (1952). No review of the inspection is provided until after the inspector has acted. Under other situations where no emergency is involved, however, final action should not be taken until there has been opportunity for reinspection, or equivalent review, within the agency."

Still other questions relate to the validity of administrative decisions or findings based on evidence obtained outside of the formal hearing, and without the presence of interested parties or counsel. These are reviewed in annotation, 18 A. L. R. (2d) 552.

these yards and has made an allowance for salaries which is based on pure speculation and is wholly inadequate to meet the cost of the service; that he has substituted in place of his accountants' figures as to actual expenditures, with respect to the item entitled "Business Getting and Maintaining Expense," a hypothetical allowance greatly less than actual cost; and that the Secretary has thus made findings without evidence and an order, essentially arbitrary, which prescribes unreasonable rates. The government answers that, while the Secretary is not authorized expressly to prescribe or limit the number of firms that may engage in the market agency business, he is under a duty to take cognizance of evidence tending to show that, under present competitive conditions, certain costs actually incurred are unreasonable; that in determining what are just and reasonable rates, he must give consideration to evidence of the excessiveness of costs and if such evidence shows that there are many market agencies not receiving a sufficient volume of business to entitle their costs to be regarded as reasonable, the Secretary must take cognizance of that fact; that it was in this view that the Secretary made certain findings as to the inadequacy of the present business at the stockyards to support economically all the firms now striving to make a profit; that his findings, supported by evidence, were directly pertinent to the determination of reasonable costs, and so determining the Secretary was authorized to fix the rates prescribed in his order.

Before reaching these questions we meet at the threshold of the controversy plaintiffs' additional contention that they have not been accorded the hearing which the statute requires. They rightly assert that the granting of that hearing is a prerequisite to the making of a valid order. The statute provides (42 Stat. 159, 166, § 310; 7 USCA § 211):

"Sec. 310. Whenever after full hearing upon a complaint made as provided in section 309, or after full hearing under an order for investigation and hearing made by the Secretary on his own initiative, either in extension of any pending complaint or without any complaint whatever, the Secretary is of the opinion that any rate, charge, regulation, or practice of a stockyard owner or market agency, for or in connection with the furnishing of stockyard services, is or will be unjust, unreasonable or discriminatory, the Secretary—

"(a) May determine and prescribe what will be the just and reasonable rate or charge, or rates or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what regulation or practice is or will be just, reasonable, and non-discriminatory to be thereafter followed; . . ."

The allegations as to the failure to give a proper hearing are set forth in Paragraph IV of the bill of complaint. . . . The allegations in substance are: That separate hearings were not accorded to the respective respondents (plaintiffs here). That at the conclusion

of the taking of the testimony before an examiner, a request was made that the examiner prepare a tentative report, which should be subject to oral argument and exceptions, so that a hearing might be had before the Secretary without undue inconvenience to him, but that the request was denied and no tentative report was exhibited to plaintiffs and no oral argument upon the issues presented by the order of inquiry and the evidence was at any time had before the Secretary. That the Secretary, without warrant of law, delegated to Acting Secretaries the determination of issues with respect to the reasonableness of the rates involved. That when the oral arguments were presented after the original hearing, and after the rehearing, the Secretary was neither sick, absent, nor otherwise disabled, but was at his office in the Department of Agriculture and the appointment of any other person as Acting Secretary was illegal. That the Secretary at the time he signed the order in question had not personally heard or read any of the evidence presented at any hearing in connection with the proceeding and had not heard or considered oral arguments relating thereto or briefs submitted on behalf of the plaintiffs, but that the sole information of the Secretary with respect to the proceeding was derived from consultation with employees in the Department of Agriculture out of the presence of the plaintiffs or any of their representatives.

On motion of the government, the District Court struck out all the allegations in Paragraph IV of the bill of complaint and the plaintiffs were thus denied opportunity to require an answer to these allegations or to prove the facts alleged.

Certain facts appear of record. The testimony was taken before an examiner. At its conclusion, counsel for respondents stated "that he would continue to demand that the Secretary hear personally the argument of the evidence in behalf of the individual respondents, or at least have some definite course of procedure adopted whereby the examiner, or some one else, should formulate a report on the evidence so that the respondents could have the character of hearing and right to present their side of the issues in this case, which they believe the law entitles them to." The government does not suggest that this request was granted and plaintiffs say that it was denied. Oral argument upon the evidence was had before the Acting Secretary of Agriculture. Subsequently, brief was filed on plaintiffs' behalf. Thereafter, reciting "careful consideration of the entire record in this proceeding," findings of fact and conclusions, and an order prescribing rates, were signed by the Secretary of Agriculture. . . .

The outstanding allegation, which the District Court struck out, is that the Secretary made the rate order without having heard or read any of the evidence, and without having heard the oral arguments or having read or considered the briefs which the plaintiffs submitted. That the only information which the Secretary had as to the

proceeding was what he derived from consultation with employees of the Department.

The other allegations of the stricken paragraph do not go to the root of the matter. Thus, it cannot be said that the failure to hear the respondents separately was an abuse of discretion. Again, while it would have been good practice to have the examiner prepare a report and submit it to the Secretary and the parties, and to permit exceptions and arguments addressed to the points thus presented—a practice found to be of great value in proceedings before the Interstate Commerce Commission—we cannot say that that particular type of procedure was essential to the validity of the hearing. The statute does not require it, and what the statute does require, relates to substance and not form.

Nor should the fundamental question be confused with one of mere delegation of authority. The government urges that the Acting Secretary who heard the oral argument was in fact the Assistant Secretary of Agriculture whose duties are prescribed by the Act of February 9, 1889 (5 USCA § 517), providing for his appointment and authorizing him to perform such duties in the conduct of the business of the Department of Agriculture as may be assigned to him by the Secretary. If the Secretary had assigned to the Assistant Secretary the duty of holding the hearing, and the Assistant Secretary accordingly had received the evidence taken by the examiner, had heard argument thereon and had then found the essential facts and made the order upon his findings, we should have had simply the question of delegation. But while the Assistant Secretary heard argument he did not make the decision. The Secretary who, according to the allegation, had neither heard nor read evidence or argument, undertook to make the findings and fix the rates. The Assistant Secretary, who had heard, assumed no responsibility for the findings or order, and the Secretary, who had not heard, did assume that responsibility.

We may likewise put aside the contention as to the circumstances in which an Acting Secretary may take the place of his chief. In the course of administrative routine, the disposition of official matters by an Acting Secretary is frequently necessary and the integrity of administration demands that credit be given to his action in that capacity. We have no such question here. The Acting Secretary did not assume to make the order.

What is the essential quality of the proceeding under review, and what is the nature of the hearing which the statute prescribes?

The proceeding is not one of ordinary administration, conformable to the standards governing duties of a purely executive character. It is a proceeding looking to legislative action in the fixing of rates of market agencies. And, while the order is legislative and gives to the proceeding its distinctive character (*Louisville & Nashville R. Co. v. Garrett*, 231 U. S. 298, 307), it is a proceeding which by virtue of

the authority conferred has special attributes. The Secretary, as the agent of Congress in making the rates, must make them in accordance with the standards and under the limitations which Congress has prescribed. Congress has required the Secretary to determine, as a condition of his action, that the existing rates are or will be "unjust, unreasonable, or discriminatory." If and when he so finds, he may "determine and prescribe" what shall be the just and reasonable rate, or the maximum or minimum rate, thereafter to be charged. That duty is widely different from ordinary executive action. It is a duty which carries with it fundamental procedural requirements. There must be a full hearing. There must be evidence adequate to support pertinent and necessary findings of fact. Nothing can be treated as evidence which is not introduced as such. *United States v. Abilene & Southern R. Co.*, supra. Facts and circumstances which ought to be considered must not be excluded. Facts and circumstances must not be considered which should not legally influence the conclusion. Findings based on the evidence must embrace the basic facts which are needed to sustain the order. *Interstate Commerce Commission v. Louisville & Nashville R. Co.*, supra; *Chicago Junction Case*, 264 U. S. 258, 263; *United States v. Abilene & Southern R. Co.*, supra; *Florida v. United States*, supra; *United States v. B. & O. R. Co.*, supra.

A proceeding of this sort requiring the taking and weighing of evidence, determinations of fact based upon the consideration of the evidence, and the making of an order supported by such findings, has a quality resembling that of a judicial proceeding. Hence it is frequently described as a proceeding of a quasi-judicial character. The requirement of a "full hearing" has obvious reference to the tradition of judicial proceedings in which evidence is received and weighed by the trier of the facts. The "hearing" is designed to afford the safeguard that the one who decides shall be bound in good conscience to consider the evidence, to be guided by that alone, and to reach his conclusion uninfluenced by extraneous considerations which in other fields might have play in determining purely executive action. The "hearing" is the hearing of evidence and argument. If the one who determines the facts which underlie the order has not considered evidence or argument, it is manifest that the hearing has not been given.

There is thus no basis for the contention that the authority conferred by section 310 of the Packers and Stockyards Act is given to the Department of Agriculture, as a department in the administrative sense, so that one official may examine evidence, and another official who has not considered the evidence may make the findings and order. In such a view, it would be possible, for example, for one official to hear the evidence and argument and arrive at certain conclusions of fact, and another official who had not heard or considered either evidence or



argument to overrule those conclusions and for reasons of policy to announce entirely different ones. It is no answer to say that the question for the court is whether the evidence supports the findings and the findings support the order. For the weight ascribed by the law to the findings—their conclusiveness when made within the sphere of the authority conferred—rests upon the assumption that the officer who makes the findings has addressed himself to the evidence and upon that evidence has conscientiously reached the conclusions which he deems it to justify. That duty cannot be performed by one who has not considered evidence or argument. It is not an impersonal obligation. It is a duty akin to that of a judge. The one who decides must hear.

This necessary rule does not preclude practicable administrative procedure in obtaining the aid of assistants in the department. Assistants may prosecute inquiries. Evidence may be taken by an examiner. Evidence thus taken may be sifted and analyzed by competent subordinates. Argument may be oral or written. The requirements are not technical. But there must be a hearing in a substantial sense. And to give the substance of a hearing, which is for the purpose of making determinations upon evidence, the officer who makes the determinations must consider and appraise the evidence which justifies them. That duty undoubtedly may be an onerous one, but the performance of it in a substantial manner is inseparable from the exercise of the important authority conferred.

The government presses upon our attention the case of *Local Government Board v. Arlidge*, [1915] A. C. 120, reversing *King v. Local Government Board*, [1914] 1 K. B. 160. That case has provoked much discussion, but we do not think it necessary to review it, as it relates to a different sort of administrative action and is not deemed to be pertinent to a proceeding under the statute before us and to the hearing which is required by the principles established by our decisions.

Our conclusion is that the District Court erred in striking out the allegations of Paragraph IV of the bill of complaint with respect to the Secretary's action. The defendants should be required to answer these allegations and the question whether plaintiffs had a proper hearing should be determined.

The decree is reversed and the cause is remanded for further proceedings in conformity with this opinion. It is so ordered.<sup>6</sup>

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<sup>6</sup> This case contrasts in an interesting way with *Local Government Board v. Arlidge*, [1915] A. C. 120. There the statute provided for an appeal from the Borough Council to the Board under procedure to be fixed by the Board. Arlidge appealed to the Board which ordered an inquiry and hearing by an inspector. The inspector reported to the Board not only the evidence taken at the hearing but also his own *ex parte* findings based upon his investigation of the premises. The Board thereupon decided the case against Arlidge without giving him the privilege of appearing in person before the Board itself and being heard

**State ex rel. Madison Airport Co. v. Wrabetz, Supreme Court of Wisconsin, 1940. 231 Wis. 147, 285 N. W. 504.**

Action commenced upon the relation of the Madison Airport Company for a writ of *mandamus* commanding the defendants, Voyta Wrabetz and Harry R. McLogan, constituting the state Industrial Commission, to correct a return made by the commission in an action which was pending in the circuit court for Dane county to set aside an award, and in which the relator is the plaintiff, and the commission and Eleanore Anderson are the defendants. The court granted a motion made by the defendants, Wrabetz and McLogan, to quash the alternative writ and dismiss the action on the ground that neither the petition nor the writ stated facts showing that the relator was entitled to the writ. The relator appealed from an order to that effect. . . .

FRITZ, J. In its petition for a writ of *mandamus* the relator, Madison Airport Company, alleged the following matters. The defendants, Voyta Wrabetz and Harry R. McLogan, are commissioners of and constitute the Industrial Commission of this state. Eleanore Anderson filed an application with the commission for compensation by reason of the death of her husband, Harold Anderson, who, she alleged, was an employee of the relator and killed in the course of his employment. The relator denied that Harold Anderson was in its employment; that he met his death in the course thereof; and that it was subject to the Compensation Act. Hearings upon the issues were had before one examiner and later before another examiner, and the testimony presented by the parties was taken in shorthand by phonographic reporters provided by the commission. The examiners signed and filed findings and awarded compensation benefits to be paid by the relator to the applicant. Within twenty days the relator filed a written petition with the commission, as a commission, to review the examiners' findings and order; and demanded of the defendants herein that the testimony taken before the examiners be transcribed and considered by the defendants in reviewing the examiners' findings and award, and that oral arguments be permitted to be heard by defendants, as a commission, upon such review. On August 12, 1937, the commission entered the following order:

"Petition for review in the above matter having been presented to the Industrial Commission alleging error in the findings and order of the examiners made on July 13, 1937; and the Industrial Commission having reviewed the entire record, and particularly the testimony upon

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by it. Nor was he permitted to examine the *ex parte* report. The House of Lords upheld the Board. Lord Shaw in his opinion said that the Board must "act honestly and by honest means . . . but that the judiciary should presume to impose its own methods on administrative or executive officers is usurpation."

which petitioner relies in support of his contention, and having reached its conclusion in respect to the matter set out in the petition;

"Now, therefore, The Industrial Commission does order—That such findings and order be, and the same are hereby affirmed. . . .

INDUSTRIAL COMMISSION OF WISCONSIN,

"By Voyta Wrabetz,

"Harry R. McLogan,

"Commissioners."

The relator further alleged that it had duly commenced an action in the circuit court against the commission and Eleanor Anderson for a review of the order and award of the commission; that the record returned by the defendants in that action is erroneous in that it fails to show the facts and circumstances attending the alleged review by the commission; and that, as the relator alleges upon information and belief,—

"the order of August 12, 1937, aforesaid is in fact false in that it contains a recitation that the Industrial Commission had reviewed the entire record and particularly the testimony upon which the petitioner relied in support of its contention, whereas in fact the alleged review was and is void and of no effect for the following reasons:

"a. Two examiners separately heard parts of the testimony only and neither examiner heard the whole thereof, or any transcription thereof, or any reading of the stenographer's notes thereof in making the purported findings and order of July 13, 1937.

"b. The Industrial Commission did not meet as a commission in making the alleged review referred to in the order of August 12, 1937, or in entering said order.

"c. The Industrial Commission did not read or have read to them any transcript of the testimony presented upon the hearings conducted by the examiners aforesaid, nor the notes of the phonographic reporter taken at such hearings, and did not read or have read to them the exhibits introduced upon such hearings."

The relator also alleged that the defendants threaten to bring the action to review the award in the circuit court on for a hearing upon the false and erroneous record, which the commission failed to correct as duly demanded by the relator to conform to the facts as alleged by it; and that the relator has no adequate remedy at law or of any kind except by *mandamus* to compel the defendants to correct said record to conform to the facts as alleged by it.

On this appeal the relator contends that it is entitled to have the record, which the commission returned in the action to review its award, corrected to conform to the true facts material and necessary to due process in proceedings on an application for workmen's compensation:

and that *mandamus* is a proper remedy to compel the correction of a return, which contains misstatements of fact and imputes verities contrary to the fact. On the other hand, Wrabetz and McLogan contend, in support of their motion to quash the alternative writ, and the court's order thereon, that in compensation cases the circuit court acquires jurisdiction solely from the compensation act, and has no authority to issue a writ of *mandamus* in compensation cases; that *mandamus* can be issued only to compel performance of a clear legal duty; and that the commission was under no duty to certify how the examiners heard the testimony, or whether the commissioners met and acted as a commission, or read a transcript to the testimony. . . .

Sec. 102.23 (1), Stats., provides, in relation to an award made by the commission, that the award,—

“ . . . shall be subject to review only in the manner and upon the grounds following: Within thirty days from the date of the order or award of the commission as a body any party aggrieved thereby may commence, in the circuit court for Dane county, an action against the commission for the review of such order or award, in which action the adverse party shall also be made defendant. . . . Said action may thereupon be brought on for hearing before said court upon such record by either party on ten days' notice to the other. . . . Upon such hearing, the court may confirm or set aside such order or award; and any judgment which may theretofore have been rendered thereon; but the same shall be set aside only upon the following grounds:

“(a) That the commission acted without or in excess of its powers.

“(b) That the order or award was procured by fraud.

“(c) That the findings of fact by the commission do not support the order or award.”

If, in the action thus authorized by statute, the relator can have adequate relief and remedy for the correction or avoidance of the alleged errors in the commission's return by reason of the alleged false recitals in its order affirming the examiner's award, then there is no necessity for and the relator cannot maintain this collateral action to compel the correction of that return by *mandamus*. Sec. 102.18 (2), Stats., provides, in respect to findings and orders made by an examiner, that,—

“ . . . Any party in interest who is dissatisfied with the findings or order of a commissioner or examiner may file a written petition with the industrial commission as a *commission* to review the findings or order.”

And it is prescribed in sub. (3) of sec. 102.18, Stats., that,—

“ . . . Within ten days after the filing of such petition with the commission the *commission* shall either affirm, reverse, set aside or modify such findings or order in whole or in part, or direct the taking

of additional testimony. *Such action shall be based on a review of the evidence submitted. . . .*"

The use of the terms "commission" and "as a commission," instead of requiring but a commissioner, in those provisions relating to a review of and action by the commission upon examiners' findings or orders, has significance in the law. In view of the use of those terms, those provisions do not admit of action on a review by but one of the commissioners, or action which is not based, in fact, upon a review of the evidence. Consequently, if, in the action brought by the relator to vacate the commission's affirmation of the examiners' findings and award, the relator establishes by competent proof its allegation that the alleged review by the commission was not based upon the evidence in that the commissioners had failed to read or have read to them a transcript of the evidence or phonographic notes thereof, or to otherwise duly address themselves to that evidence, then there was manifestly a denial of a review in the manner in which sec. 102.18 (3), Stats., required the commission to act. Such unlawful action on the part of the commission would be not only without or in excess of its powers and operate in effect as a fraud upon the relator, but would also constitute a denial of due process of law, in violation of the constitutional safeguards in that regard. As has been said in a number of cases, the cardinal and ultimate test of the presence or absence of due process of law in any administrative proceeding is the presence or absence of the "rudiments of fair play long known to our law." *West Ohio Gas Co. v. Public Utilities Comm.* (No. 1) 294 U. S. 63, 71, 55 Sup. Ct. 316, 79 L. Ed. 761; *Chicago, M. & St. P. R. Co. v. Polt*, 232 U. S. 165, 168, 34 Sup. Ct. 301, 58 L. Ed. 554; *Ohio Bell Tel. Co. v. Public Utilities Comm.*, 301 U. S. 292, 300, 57 Sup. Ct. 724, 81 L. Ed. 1093; *Morgan v. United States*, 304 U. S. 1, 15, 58 Sup. Ct. 773, 82 L. Ed. 1129; *Morgan v. United States*, 298 U. S. 468, 480, 56 Sup. Ct. 906, 80 L. Ed. 1288. In the case last cited, MR. CHIEF JUSTICE HUGHES said:

"If the one who determines the facts which underlie the order has not considered evidence or arguments, it is manifest that the hearing has not been given. . . . It is no answer to say that the question for the court is whether the evidence supports the findings and the findings support the order. For the weight ascribed by the law to the findings—their conclusiveness when made within the sphere of the authority conferred—rests upon the assumption that the officer who makes the findings has addressed himself to the evidence and upon that evidence has conscientiously reached the conclusions which he deems it to justify. That duty cannot be performed by one who has not considered evidence or argument. It is not an impersonal obligation. It is a duty akin to that of a judge. The one who decides must hear. . . . And to give the substance of a hearing, which is for the purpose of making deter-

minations upon evidence, the officer who makes the determinations must consider and appraise the evidence which justifies them. That duty undoubtedly may be an onerous one, but the performance of it in a substantial manner is inseparable from the exercise of the important authority conferred."

The reasons and conclusion thus stated are equally applicable to acts of the Industrial Commission in the exercise of its powers under sec. 102.18 (3), Stats., and compel the conclusion that the purported action thereunder by the commissioners, if they did not in fact read or hear read the transcript, or the phonographic notes of the evidence taken by the examiners or did not otherwise address themselves thereto, was clearly without or in excess of the commission's powers, because of which there was such a jurisdictional defect that its action must be set aside under par. (a) of sec. 102.23 (1), Stats. . . .

In respect to the right of an aggrieved party to offer proof in contradiction of a recital in a commission's findings and award, the court said in *Hackley-Phelps-Bonnell Co. v. Cooley*, 173 Wis. 128, 133, 179 N. W. 590—

"It would be indeed surprising if a party had no opportunity to show, if such be the fact, that a document in the record purporting to be the findings and award of the commission was in fact not the act of the commission. We are not convinced that this assumption is correct. If the charges of counsel amount to allegations of fraud there was an ample remedy by offering proof of the facts alleged. *International H. Co. v. Industrial Comm.*, 157 Wis. 167, 172, 147 N. W. 53." . . .

Thus this court has recognized that when an order or award of the commission is challenged in an action to vacate it because of alleged illegal acts or conduct on the part of the commission, subsequent to the taking of the testimony upon which it should have based its order or award, then the circuit court may take evidence in that action in relation to such acts or conduct. An order or award made in a proceeding conducted in disregard of the procedural safeguards prescribed by the statute authorizing the exercise of authority by the commission, or in disregard of the rudiments of fair play required by the federal and state constitutions, is certainly without and in excess of the commission's powers; and under the power vested in the circuit court by sec. 102.23, Stats., in an action brought to set an order or award aside on that ground, it is within the jurisdiction of the court to receive evidence to establish such disregard or noncompliance on the part of the commission. If the courts did not have the power to take evidence in relation to such defects in procedure leading up to the entry of an order by an administrative body, the statutory safeguards and constitutional guaranties of due process would be meaningless. Although

it is not within the court's functions or province to probe the mental processes of administrative officials in reaching conclusions, the recitals in their orders as to their procedure in conducting *quasi-judicial* proceedings are not conclusive in actions to determine whether a plaintiff is entitled to have an order vacated on the ground that the officials acted without or in excess of their powers, and in such actions the plaintiff is entitled to have the court receive his proof and render a decision on that issue. *Morgan v. United States*, 298 U. S. 468, 477, 56 S. Ct. 906, 80 L. Ed. 1288; *National Labor Relations Board v. Cherry Cotton Mills* (5th Cir.), 98 F. (2d) 444. Proper performance of the many additional onerous duties which have been imposed upon the three members of the Industrial Commission by legislation enacted since the creation thereof in 1911, primarily for the purpose of regulating industry and administering the Workmen's Compensation Act, may make it impossible for each commissioner to address himself to the evidence in all matters requiring quasi-judicial action on his part, in the manner necessary under the statutes and the "rudiments of fair play long known to our law." Although the functions, powers, and jurisdiction of the commission, as originally created, have been greatly enlarged by legislation enacted to meet demands for additional administrative agencies exercising quasi-judicial powers in many other respects than the Regulation of Industry and Workmen's Compensation (chs. 101, 102, Stats.), there has been no increase whatever in the number of its commissioners to enable them to discharge their nondelegable duties in compliance with the statutory prerequisites and the constitutional due-process-of-law safeguards.

It follows that the relator is entitled to introduce proof in its action for the vacation of the award to establish, if it can, that the defendants did not in fact base their review on the evidence, as required by sec. 102.18 (3), Stats., in that they did not read or have read to them a transcript of the testimony or the stenographic notes thereof, or otherwise duly address themselves thereto. As the relator can subpoena the commissioners and commission employees to testify in that action regarding the facts upon which the relator claims to be entitled to have defendants correct the return made by them in that action, it is evident that the relator has an adequate remedy therein and therefore is not entitled to a writ of *mandamus*. It may be well to add that the examiners' alleged acts in joining in findings without each having heard or read all of the testimony became immaterial upon the adoption of their findings and order by the commission as its findings and award. That, if valid, would in effect supersede the examiners' findings and order.

By the court—Order affirmed.

**Norris & Hirshberg, Inc. v. Securities and Exchange Commission, United States Court of Appeals, District of Columbia, 1947. 163 F. (2d) 689.**

[The Securities and Exchange Commission revoked the registration of petitioner as a broker and dealer in securities. A petition for review was filed with the Court of Appeals for the District of Columbia. Thereupon the Commission filed its transcript of the administrative record. After this filing, the petitioner asked for a writ of certiorari to obtain correction and completion of the transcript.

One of the bases for this application was the claim that the transcript did not include as a part of the record a digest of the testimony and exhibits prepared by the Commission's staff. The petitioner charged that the presiding Commissioner had admitted that the members of the Commission did not undertake to read the entire record; that the digest was the real basis of the Commission's order; and that petitioner believed that the digest did not correctly reflect the actual evidence but differed therefrom in material respects to petitioner's detriment, and that in consequence petitioner had been denied a consideration of and a decision upon the actual proof adduced at the hearing.

The Court held, however, that that contention was not well founded and said:]

We come now to the petitioner's final contention that a summary or digest of the evidence, which the Commission had before it in considering the case, constituted the real "evidence" underlying the decision and that therefore the summary or digest should have been filed in the record. Whether the argument is valid depends upon the nature of the summary and the use to which it was put by the Commission. In considering a case such as this, the Commission might have before it four sorts of documents: the pleadings, a transcript of the evidence, briefs of counsel, and memoranda prepared by members or subordinates. It is well established that only the pleadings and the evidence constitute the record upon which the decision must be based. Briefs, and memoranda made by the Commission or its staff, are not parts of the record. Our duty on appeal, being only to say whether the record justifies the order, is therefore only to examine the pleadings and the evidence. What may be said by counsel in their briefs, or by a commissioner or a subordinate in a memorandum concerning the record, does not properly come before us.

The Commission asserts, and upon remand doubtless will certify, that the summary was not considered as, or in lieu of, the actual evidence. That being true, it falls in the category of internal memoranda made during the decisional process which are never included in a record.

An administrative agency such as the respondent here may utilize the services of subordinates to sift and analyze the evidence received by the trial examiner and subsequent use by the agency of a written



resume of that sifting and analyzing is a part of its internal decisional process which may not be probed on appeal.

As the summary is said to have been prepared by employees simply to aid in the Commission's examination of the record, its use appears to have been a part of the Commission's decisional procedure. We are not concerned with the manner in which the Commission gives consideration to the record; it is enough if it certifies that consideration has been given and that its findings arise therefrom. That much is required, but not more. It was, consequently, neither necessary nor proper for the digest of evidence used by the Commission to be made a part of the transcript, if the digest was used only as a help in considering the true record, as the Commission asserts.<sup>7</sup>

### Institutional Decisions.

The rule of the Morgan case, often condensed to the rather inaccurate rubric that "he who decides must hear," has posed a difficult problem for administrative agencies.

The crux of it is the hard fact that most agencies carry such heavy case loads that it would be physically impossible for the members of the agency to read transcripts of the testimony in all the cases they must decide. Delegation of some measure of authority, and reliance on advisory reports of staff assistants, are required by the sheer necessities of the case.

What is the real meaning of the requirement that the members of the agency must "master the record"? How does their duty in this respect compare with that of a trial judge who refers a case to a master for an advisory report, and then decides the case on the basis of exceptions to the master's report: Are trial judges expected to read all of the testimony taken before the master?

For reasons which will become more fully apparent on reading the later cases in this chapter, there is a dearth of judicial authority on these questions. The decision in the second Morgan case, 304 U. S. 1, 82 L. Ed. 1129, 58 S. Ct. 773 (*supra*), is one of the few cases disclosing the extent to which an agency head actually undertook to achieve personal knowledge of the contents of the record, which in that case comprised about 10,000 pages of transcript of oral testimony and more than 1,000

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<sup>7</sup> Was the court correct? If the Commission, in deciding the case, did rely solely on the summary, and if in fact the summary gave an erroneous version of the testimony, is it not quite possible that the Commission reached a different result than would have been reached on the basis of an accurate summary?

Is the decision justified on the basis that it would unduly interfere with the adjudicatory processes of agencies, and place an undue burden on the reviewing courts, if agencies were required (whenever appropriate challenge was made) to submit to the reviewing court copies of all intra-agency memoranda, and defend their accuracy and adequacy?

pages of statistical exhibits. This bulky record was placed on the Secretary's desk and "he dipped into it from time to time to get its drift." He took home, and read, the transcript of the oral argument, and appellants' briefs. He had several conferences with staff assistants. What did the court indicate it thought as to whether this was a sufficient discharge of his duty to "master the record"?

Section 7 (c) of the Federal Administrative Procedure Act provides in part that "no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party . . ." Does this require the members of the agency to examine personally those portions of the record to which the parties specifically direct their attention? Suppose a party cites several thousand pages of testimony?

Section 10 of the Model State Administrative Procedure Act requires that whenever in a contested case a majority of the officials of the agency who are to render the final decision have not heard or read the evidence, the decision (if adverse to respondent) shall not be made until a proposal for decision (including findings of fact and conclusions of law) has been served on the parties, "and an opportunity has been afforded to each party adversely affected to file exceptions and present argument to a majority of the officials who are to render the decision, who shall personally consider the whole record or such portions thereof as may be cited by the parties."

Does this require more than the court required in the Morgan case?

A cynical suggestion has been made that the only person who actually weighed the evidence in the Morgan case was a clerical employee who placed the administrative record on the postal scales before it was transmitted through the mails to the reviewing court.

**National Labor Relations Board v. Botany Worsted Mills, Inc., United States Circuit Court of Appeals, Third Circuit, 1939. 106 F. (2d) 263.**

Petition by the Botany Worsted Mills against the National Labor Relations Board to review and set aside an order of the Board, and petition by the National Labor Relations Board against Botany Worsted Mills, Inc., for enforcement of the order.

CLARK, Circuit Judge. In 1757 the British public was profoundly shocked at the sentence of death imposed by a naval court martial upon Admiral Byng "pour encourager les autres" for his "negligent" conduct at the siege of Minorca. This decision was considered so harsh that a bill passed the House of Commons releasing the members of the court martial from their oath of secrecy in order that an investigation might be had. But the bill was defeated in the House of Lords, due to the efforts of Lords Hardwicke and Mansfield. According to the biographer of the former :

" . . . They treated the subject with judicial accuracy and precision, showing that criminal justice could not be administered satisfactorily by any tribunal in the world if there were to be a public disclosure of the reasonings and observations of those who are to pronounce the verdict or judgment while they are consulting together." Campbell, *Lives of the Lord Chancellors*, Vol. V, Chapter 136, p. 141.

Counsel in the case at bar urge us to order (by issuance of interrogatories under plea of denial of fair hearing) somewhat similar public disclosures from members of the National Labor Relations Board, who have consulted together to pronounce a judgment adverse to the petitioner, their client.

In considering the question thus raised we are, unfortunately, without benefit of the precise points used by the two learned Lords in persuading Parliament to let Byng go to his death. See 15 Parl. Hist. 803-822. Other jurists have, however, exhibited a corresponding reluctance to pry into the doings of triers of fact. It is said, for instance, that jurors are privileged from disclosing their arguments, votes and other media concludendi, in order that their freedom of debate and independence of thought may be safeguarded, *Clark v. United States*, 289 U. S. 1, 53 S. Ct. 465, 77 L. Ed. 993; 2 Wigmore on Evidence § 2346. The same result is reached by application of the parol evidence rule to the verdict, 2 Wigmore on Evidence § 2348. Furthermore, a juror's inability to impeach his verdict presents an almost complete barrier to inquiry and is based upon persuasive reasons of policy. As the Supreme Court has put it: ". . . If the facts were as stated in the affidavit, the jury adopted an arbitrary and unjust method in arriving at their verdict, and the defendant ought to have had relief, if the facts could have been proved by witnesses who were competent to testify in a proceeding to set aside the verdict. But let it once be established that verdicts solemnly made and publicly returned into court can be attacked and set aside on the testimony of those who took part in their publication and all verdicts could be, and many would be, followed by an inquiry in the hope of discovering something which might invalidate the finding. Jurors would be harassed and beset by the defeated party in an effort to secure from them evidence of facts which might establish misconduct sufficient to set aside a verdict. If evidence thus secured could be thus used, the result would be to make what was intended to be a private deliberation, the constant subject of public investigation; to the destruction of all frankness and freedom of discussion and conference." *McDonald v. Pless*, 238 U. S. 264, 267, 268, 35 S. Ct. 783, 784, 59 L. Ed. 1300.

What we have written and quoted serves to indicate the character of the policy. It is directed against "conviction out of their own mouths" only. Thus evidence of defective deliberation has been considered proper if offered aliunde. The happenings of the jury room are

not sacred if heard through the keyhole or observed through the transom, *Wilson v. Berryman*, 5 Cal. 44, 46, 63 Am. Dec. 78; *Houk v. Allen*, 126 Ind. 568, 569, 25 N. E. 897, 11 L. R. A. 706; *Wright v. Abbott*, 160 Mass. 395, 36 N. E. 62, 39 Am. St. Rep. 499; *Bradt v. Rommell*, 26 Minn. 505, 5 N. W. 680; *Boynton v. Trumbull*, 45 N. H. 408, and see *Vaise v. Delaval*, 1 T. R. 11; *Burgess v. Langley*, 5 Man. & G. 722. A fortiori a juror's incapacity whether deafness, ignorance of the language, sleep or intoxication can be shown, *Zimmerman v. Carr*, 59 Ind. App. 245, 109 N. E. 218; *Com. v. Jones*, 12 Phila. 550; *McCampbell v. State*, 9 Tex. App. 124, 35 Am. Rep. 726; *Shaw v. Fisk*, 21 Wis. 368, 369, 94 Am. Dec. 547; 12 A. L. R. 663; 34 A. L. R. 194; 46 C. J. 145.

Does this policy against "internal" evidence of how the wheels of judicial machinery go around apply with equal or perhaps greater force to the judicial function of an administrative board? We think it does. In saying so we take note of a division in the authorities, pro—*National Labor Relations Board v. Biles Coleman Lumber Co.*, 9 Cir., 98 F. 2d 16; *Cupples Co. Manufacturers v. National Labor Relations Board*, 8 Cir., 103 F. 2d 953; *Inland Steel Co. v. National Labor Relations Board*, 7 Cir., 105 F. 2d 246, decided June 21, 1939; con—*C. J. Tower & Sons v. United States*, Cust. & Pat. App., 71 F. 2d 438 (Secretary of the Treasury); *Morgan v. United States*, 298 U. S. 468, 56 S. Ct. 906, 80 L. Ed. 1288 (Secretary of Agriculture); *National Labor Relations Board v. Cherry Cotton Mills*, 5 Cir., 98 F. (2d) 444, 449, 1021. We believe that the dissent arises from the failure of the courts to observe a distinction indicated by the ratio decidendi of the cases we have previously cited and quoted from. But before proceeding to a fuller exposition of that distinction we must touch upon another, also often overlooked. That is the difference between the essential characteristics of the "fair hearing" itself and the method of ascertaining the presence or absence of those essentials. In the case at bar many of the inquiries are directed to the nonessentials of due process.

We may conveniently divide the interrogatories sought into four categories. They are those touching upon (1) the reading of the record, (2) the reading of the trial examiner's report and the exceptions thereto, (3) the preparation of the Board's decision, and (4) the ex-parte hearing of the Board's own counsel. It is both obvious and well settled by authority that the one who decides must hear or, in the case of written testimony, read, *Morgan v. United States*, 298 U. S. 468, 56 S. Ct. 906, 80 L. Ed. 1288, above cited. The United States Supreme Court does not seem to share the cynicism of a writer in the *Yale Law Journal* who said: ". . . No one has dared suggest that litigants may impeach the decision of judges of intermediate appellate courts on the ground that they had not read the record made before a lower court. No lawyer is naive enough to believe that judges actually read through

the records in the cases before them." Feller, *Prospectus for the Further Study of Federal Administrative Law*, 47 *Yale Law Journal* 646 at 664.

As the question here, then, is one of method of ascertainment only, we postpone our discussion thereof and proceed with the three other alleged denials of due process.

The reading or failure to read the trial examiner's report and the exceptions thereto is relevant only to the question of argument. Petitioner argued before the trial examiner but did not argue before the Board. In this respect the case at bar differs from the *Biles Coleman*, *Cherry Cotton Mills*, *Cupples*, and *Inland Steel* cases, where oral argument was had before the Board. Yet petitioner neither alleges nor could allege (since the Board quoted from its brief submitted to the trial examiner) that it was denied a written argument or that it requested any argument at all. That being so, it is impossible to discern any denial of due process, *National Labor Relations Board v. Mackay Radio & Telegraph Co.*, 304 U. S. 333, 58 S. Ct. 904, 82 L. Ed. 1381; *Consolidated Edison Co. v. National Labor Relations Board*, 305 U. S. 197, 59 S. Ct. 206, 83 L. Ed. 126; *Federal Radio Commission v. Nelson Bros. Bond & Mortgage Co.*, 289 U. S. 266, 287, 53 S. Ct. 627, 77 L. Ed. 1166, 89 A. L. R. 406; *National Labor Relations Board v. American Potash & Chemical Corp.*, 9 Cir., 98 F. 2d 488. We are correspondingly not required to consider the perplexing problem of whether argument to the Board itself (the statute, 29 USCA § 160, is silent as to written argument, providing only for discretionary oral argument) is a constitutional necessity or merely a legalistic luxury. Compare *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 47, 57 S. Ct. 615, 81 L. Ed. 893, 108 A. L. R. 1352, with *Morgan v. United States*, 298 U. S. 468, 56 S. Ct. 906, 80 L. Ed. 1288, and *Consolidated Edison Co. v. National Labor Relations Board*, 305 U. S. 197, 59 S. Ct. 206, 83 L. Ed. 126, above cited. See, also, *Handler*, *The Morgan Case and the National Labor Relations Board*, *Commerce Clearing House, Labor Law Comments*, No. 5; *Judicial Control of Administrative Procedure: The Morgan Cases*, 52 *Harvard Law Review* 509 (note); Feller, *Prospectus for the Further Study of Federal Administrative Law*, 47 *Yale Law Journal* 646, above cited; *Oppenheimer*, *The Supreme Court and Administrative Law*, 37 *Columbia Law Review* 1, 33-37; *Fraenkel*, *Constitutional Issues in the Supreme Court*, 1937 Term. 87 *University of Pennsylvania Law Review* 50, 63; *Implications of the Second Morgan Decision*, 33 *Illinois Law Review* 227; 38 *Columbia Law Review* 1279, 1282 (note); 37 *Michigan Law Review* 597, 602-605 (Comment).

We feel that the inquiry into the mechanics of opinion-writing is ethical rather than legal. The standard that frowns upon plagiarism, or, if commercialized, forbids it, applies to all writing and not only to

the literary efforts of judicial officers. We have gone beyond the practice of ancient Rome where the copyright could be protected only by writing another poem.

"Fidentinus, by stealing my verse  
As a poet you hope to be known?  
That's the way Aegle thinks she has teeth,  
Though her mouth's filled with iv'ry and bone."  
Martial, Epigrams (Nixon's trans. 1911) 72.

Because, however, a particular writer with or without acknowledgment adopts the exact or substantial phraseology of others, it does not follow that he has abdicated in favor of mental processes extrinsic to his own. The frequent affirmation by an appellate court on the opinion of the court below is an instance. That practice, though of possible annoyance to industrious counsel, Bruce, *The American Judge*, p. 76, has never, to our knowledge, been challenged on constitutional grounds. A writer in the *Columbia Law Review* suggests another analogy in the adoption by a judge of material prepared by his law clerk, 38 *Columbia Law Review* 1279, 1282 (note), above cited; cf. *United States v. Standard Oil Co. of California*, D. C., 20 F. Supp. 427, 450. A less pleasant illustration might be found in a comparison of the opinions of some courts with the briefs of counsel. We may add that the Labor Board has never made any mystery of the part taken by the attorneys in its "Review Division" in aiding it in writing its opinions, Gelhorn and Linfield, *Politics and Labor Relations*, 39 *Columbia Law Review* 339 at pages 384, 385; Madden, *Administrative Procedure*; National Labor Relations Board, 45 *West Virginia Law Quarterly* 93, 96.

We think it unfortunate that questions directed to the participation of Mr. Midonick in the proceeding have the effect of casting aspersions upon his integrity. If in fact he was of counsel in the prosecution of the cause and the Board heard him ex-parte, the absence of due process would be conceded and the method of its proof would come under our discussion of that point. Indeed, even that would seem unnecessary in view of the ease of ascertaining that fact aliunde or, in other words, by the testimony of Mr. Midonick in open court—a procedure which would afford that gentleman the fair hearing petitioner desires for itself. However, the petitioner by its own pleadings and supporting affidavit has made this issue no longer relevant. For it appears from those documents that Mr. Midonick did not act as counsel before the trial examiner, but rather in some other capacity disconnected with the prosecution of the case. Insofar as is alleged, he may well have been a member of the "Review Division" above referred to. Compare *Morgan v. United States*, 304 U. S. 1, 22, 58 S. Ct. 773, 999, 82 L. Ed. 1129.

We return, then, to the method of inquiry into the one essential of due process lacking if the facts are as claimed. The Supreme Court

has given this method its sanction in the case of one executive officer, *Morgan v. United States*, 298 U. S. 468, 56 S. Ct. 906, 80 L. Ed. 1288, above cited; *Morgan v. United States*, 304 U. S. 1, 58 S. Ct. 773, 999, 82 L. Ed. 1129, above cited. Even there, that august body seems to have had some qualms. It permitted the fact, but denied its exploitation, saying: "In the light of this testimony there is no occasion to discuss the extent to which the Secretary examined the evidence, and we agree with the Government's contention that it was not the function of the court to probe the mental processes of the Secretary in reaching his conclusions if he gave the hearing which the law required." *Morgan v. U. S.*, 304 U. S. 1, at page 18, 58 S. Ct. at page 776, 82 L. Ed. 1129, above cited.

By way of contrast, in *McDonald v. Pless*, above cited, the Supreme Court had already upheld the right of privacy of a deliberative body. These two decisions of the high court thus established that the cogitations of one person and the deliberations of more than one are not only different in fact, but distinguishable in law. The interrogation of a single judge may be futile; if he is aware of the obligations of the judicial function, he is unlikely to fail in their performance. If, on the other hand, he is of the type and caliber that fails to recognize or neglects to undertake them, he is, by the same token, quite unlikely to admit it. Nevertheless the inquiry itself, though more than probably sterile, is, we think, harmless. Unlike the mayhap equally sterile inquiry into the plural judicial process, it does not encroach upon the right of privacy of mutual deliberation.

The essence of the discussion of a common cause and the judgment ensuing upon that discussion must lie in freedom of expression. If those present during the discussion are aware that their sentiments, either tentative or final, may be revealed by their fellow participants, it is clear that caution or worse would remove all candor from their minds and tongues. The logic of this position requires the preservation from questioning of each member of the general body. Each one's action or reaction is part of the common pool; to cast suspicion upon any one of them is to muddy the general waters. To illustrate simply, if Mr. X is asked, "Did you read the record?", what is to prevent his fellow member, Mr. Y, from being asked, "Did Mr. X act as if he had read the record?"; and so ad infinitum. Thus the freedom of deliberation is indirectly restrained.

We are glad, therefore, to ensure to members of the Labor Board the same protection accorded to jurors since the 18th Century. In so doing we do not disregard the fact that the Board is commanded by statute to act as prosecutor as well as judge, and to appear in this Court as a party litigant, 29 USCA § 160. See Wolf, *Administrative Procedure Before the National Labor Relations Board*, 5 *University of Chicago Law Review* 358; Cushman, *Constitutional Status of Inde-*

pendent Regulatory Commissions, 24 Cornell Law Quarterly 13, 163; Stason, Administrative Tribunals: Organization and Reorganization, 36 Michigan Law Review 533; Jaffe, Invective and Investigation in Administrative Law, 52 Harvard Law Review 1201. Historically, the early English method of appeal was similar, i. e., by way of a semi-criminal proceeding against the trial judge. Historically again, it would seem that the judge was then, as probably now, immune from inquiry by virtue of the unimpeachability of his court records, Holdworth, History of English Law, Vol. 1, p. 213; 3 Blackstone's Commentaries, §§ 24, 405. As a matter of policy and not of history, we think that efficient deliberation by a quasi-adversary, such as the Labor Board, is even more necessary than efficient deliberation by a neutral, such as a judge or a jury. Furthermore, since the litigants before the Labor Board are legion, the evil of harassment referred to by the Supreme Court in *McDonald v. Pless* above cited, is correspondingly multiplied. The function of deciding controversies might soon be overwhelmed by the duty of answering questions about them.

When one comes to consider the record itself and the conclusions which the Labor Board deduces therefrom, one wonders at the insistent desire of counsel to inquire into the methods whereby those conclusions were reached. In view of what appears to be their conception of the judicial practice, we are somewhat nervous about stating that we have read the record. That does happen to be the fact and we may say that our reading gives us an impression of the faithful performance of duty by the members of the Labor Board. We are, it is true, constrained to disagree with them in two aspects of the case and are thus brought to the recital of what we read in the record. . . .

[Thereupon the court proceeded to consider two aspects of the case. In connection with each it questioned the Board's determination of the issues involved.]

The petition for the issuance of interrogatories to the members of the National Labor Relations Board by them to be answered under oath and to be returned to this court is denied. The order of the National Labor Relations Board is modified by striking therefrom clause (b) of paragraph 1 and (a) of paragraph 2 thereof and its enforcement as so modified will be decreed. The record is remanded to the National Labor Relations Board for a further determination, in accordance with the views expressed in this opinion, of the matter of whether Joseph Peidl has since his discharge by petitioner obtained other regular and substantially equivalent employment.<sup>8</sup>

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<sup>8</sup> For brief comments on the use of interrogatories to test administrative orders, see 25 Ia. L. Rev. 128 (1941), the author being critical of the use of interrogatories; and 4 Ga. B. Jour. 53 (1941), taking the opposite view. Also see 30 Ill. B. Jour. 155 (1941).



**Judicial Refusal to Inquire into Agency's Mastery of Record.**

As indicated by the Botany Worsted Mills case, the requirement that agencies must "master the record" is one which for most practical purposes is committed to the consciences of agency members. The Supreme Court spoke strongly in the fourth Morgan decision, 313 U. S. 409, 85 L. Ed. 1429, 61 S. Ct. 999 (1941): "The Secretary thereupon appeared in person at the trial. He was questioned at length regarding the process by which he reached the conclusions of his order, including the manner and extent of his study of the record and his consultation with subordinates. His testimony shows that he dealt with the enormous record in a manner not unlike the practice of judges in similar situations, and that he held various conferences with the examiner who heard the evidence. Much was made of his disregard of a memorandum from one of his officials who, on reading the proposed order, urged considerations favorable to the market agencies. But the short of the business is that the Secretary should never have been subjected to this examination. The proceeding before the Secretary 'has a quality resembling that of a judicial proceeding.' *Morgan v. United States*, 298 U. S. 468, 480, 80 L. Ed. 1288, 1294, 56 S. Ct. 906. Such an examination of a judge would be destructive of judicial responsibility. We have explicitly held in this very litigation that 'it was not the function of the court to probe the mental processes of the Secretary,' 304 U. S. 1, 18, 82 L. Ed. 1129, 58 S. Ct. 773, 999. Just as a judge cannot be subjected to such a scrutiny, compare *Fayerweather v. Ritch*, 195 U. S. 276, 306, 307, 49 L. Ed. 193, 213, 214, 25 S. Ct. 58, so the integrity of the administrative process must be equally respected. See *Chicago, B. & Q. R. Co. v. Babcock*, 204 U. S. 585, 593, 51 L. Ed. 636, 638, 27 S. Ct. 326. It will bear repeating that although the administrative process has had a different development and pursues somewhat different ways from those of courts, they are to be deemed collaborative instrumentalities of justice and the appropriate independence of each should be respected by the other. *United States v. Morgan*, 307 U. S. 183, 191, 83 L. Ed. 1211, 1217, 59 S. Ct. 795."

Suppose it appears that the transcript of testimony had not been typewritten until after the agency (charged with the duty of "mastering the record") had announced its decision? This question was faced by two state courts, in remarkably similar cases. Both involved state Liquor Control Commission decisions in cases where a licensee was charged with violations of the liquor control law. In each case, there was a hearing before a hearing examiner, and that official made a recommended decision, and exceptions were thereupon filed, and arguments on such exceptions were had before the Commission (which was charged with the duty of considering the record of testimony). After hearing arguments, the Commission announced a decision. It was not until after the announcement of the decision that the stenographic reporter filed the transcript of testimony with the Commission. Does this circumstance

warrant the conclusion that the members of the agency had not—either personally or with the aid of staff assistants—performed their duty of mastering the record before reaching a decision? Compare the decisions in *Weekes v. O'Connell*, 304 N. Y. 259, 107 N. E. (2d) 290 (1952) and *Napuche v. Liquor Control Commission*, 336 Mich. 398, 58 N. W. (2d) 118 (1953).

### **Procedures Employed and Suggestions for Improvement.**

The problem of assuring that decisions of administrative agencies be based on careful and competent appraisal of the testimony is one which must be solved by legislative action and by the conscientious effort of the agencies.

Many suggestions have been made. In order to appraise them (and, indeed, to fully understand the whole problem) it is necessary to examine the techniques actually employed by the agencies, in making decisions. The methods vary widely, but a typical example is afforded by the National Labor Relations Board, which has been the subject of frequent studies in this connection.

In cases involving a complaint that respondent has been guilty of unfair labor practices, evidence is heard before a trial examiner, who prepares an intermediate report (as it was formerly called) and a recommended decision. The Board then proceeds to consider the case on the basis of the trial examiner's report, and exceptions which have been filed thereto.

The details of the procedure, as it existed in 1941, were described as follows in a monograph prepared under the supervision of the Attorney General's Committee on Administrative Procedure (Senate Document 10, 77th Congress, 1st Session, p. 24) :

When an intermediate report is filed with the Board the case is assigned by the Associate General Counsel at the head of the Review Division to one of the approximately ninety attorneys on his staff. The function of the review attorney is to make a complete study of the record with the view, first, of acquainting the members of the Board with the details of the case and providing them with any information they may desire in arriving at a decision, and, second, of drafting the Board's final decision and order.

The review attorney's analysis of the case includes examination of the pleadings, the trial examiner's intermediate report, the transcript of the record, and the parties' exceptions and briefs. Detailed notes are taken on the record, and are ultimately integrated so as to bring together all the evidence on any given issue. The review attorney frequently engages in legal research, or seeks the advice of the Division of Economic Research on technical questions of labor relations. He may also confer with his supervisor during this stage of his work, but, as a rule, he does not discuss the case with the supervisor until his study of the record is completed.

The discussion with the supervisor, in preparation for the presentation of the case to the Board, involves an exhaustive report of the results of

the review attorney's work. The aim of this conference is to reduce the review attorney's conception of the case to a cohesive and intelligible story by eliminating all cumulative and irrelevant material. The supervisor has usually read the pleadings, intermediate report, and briefs prior to discussing the case; if he is skeptical about the review attorney's impression of particular matters, he checks the record to satisfy his doubts. When the supervisor and the review attorney have agreed upon the description and analysis of the case which they believe will fairly and fully reflect its various aspects, a conference with the Board members is arranged.

In order to synchronize the oral argument with the review attorney's conference with the Board, the time for the argument is not set until the review attorney has indicated to his supervisor the approximate time in which his study of the record will be completed. This may vary from a few days to several months depending upon the complexity of the issues involved, but on the average does not exceed a month.

Shortly prior to the oral argument, the review attorney prepares a four or five page memorandum containing a summary statement of the case, an outline of the evidence, and a brief discussion of the major issues raised by the exceptions. This memorandum serves to familiarize the Board sufficiently with the controversy to enable it to profit from the oral argument.

As soon as possible after oral argument is heard, the review attorney makes his full report to the Board. The conference is attended by the supervisor and sometimes by the Associate General Counsel. The nature and length of the report depend upon the complexity of the case, the quality of the oral argument previously heard by the Board, and the existence of any conflict between the members of the Board concerning the decision to be rendered. The question of jurisdiction, for example, is rarely discussed, being very infrequently in issue; the Board properly assumes that if the regional director, the secretary, the trial attorney, the parties, the trial examiner, the review attorney, and the supervisor all agree that interstate commerce is involved, there is no occasion for it to inquire into that question with particularity. Where there is a close question, on the other hand, the review attorney gives a full description of all the evidence on both sides, and indicates the significant portions of the record when the Board feels that the actual reading of the testimony would facilitate its consideration of the issue.

As a rule, after the review attorney has finished his report and the Board members have discussed among themselves and with him and his supervisor the manner in which to dispose of the various issues, the Board makes its decision and instructs the review attorney to prepare a draft decision accordingly. If particularly difficult questions are involved, and further study seems desirable before they are resolved, the Board may request the review attorney and his supervisor to renew their analysis of the case and to report back at some later time. Or they may decide to examine the controversial portions of the record themselves prior to arriving at a decision. In any event, once a decision is reached, the review attorney begins to prepare a draft of the Board's findings and order.

When the review attorney completes his draft of the final decision, which, as has previously been observed, contains findings of facts, conclusions, and an order, with an analysis of the evidence supporting the findings and an argumentative opinion justifying the conclusions, he

submits it to his supervisor for revision and approval. Copies of the revised draft are then distributed to the members of the Board and the Associate General Counsel for their criticisms and suggestions. A careful study is made by them of both the form and substance of the draft decision; further conferences among the Board members and the review attorney or his superiors are frequently necessary before the decision is reduced to its final form. Eventually it is adopted by the Board members as their own, is signed by them, and is served on the parties.

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Voluminous evidence as to the actual functioning of the Review Section was received by the so-called Smith Committee of the House of Representatives which in 1940 investigated the work of the Board. In the course of these hearings, a number of review attorneys were examined by members of Congress desirous of learning the extent to which the actual decision-making was, in fact, delegated to these employees. From this investigation, there emerged a general congressional conviction that the Review Section "had, in effect, taken over the decision making function of the Board" (Staff Report to Subcommittee on Labor and Labor Management Relations, U. S. Senate, 82d Congress, 2d Session, p. 15).

Disapproving such delegation, Congress abolished the office of Review Attorney when it amended the Wagner Act by the Labor Management Relations Act, 1947, 61 Stat. 136, 29 U. S. C. Suppl. 141. The amendatory act provided in section 4 (a) that "the Board may not employ any attorneys for the purpose of reviewing transcripts of hearings or preparing drafts of opinions except that any attorney employed for assignment as a legal assistant to any Board member may for such Board member review such transcripts and prepare such drafts." A report of the Senate Labor Committee explained the elimination of the Review Section as being predicated upon the belief that Congress "intended the Board to function like a court," whereas under the operations of the Review Section there was a tendency to dispose of cases in an "institutional fashion." Senator Ball, in the course of debate, expressed his belief that each member of the Board would be required to "write his own opinions instead of having them written in a central review bureau."

The actual method of operations under the amended act was described in 1952 in the Staff Report to the Subcommittee on Labor and Labor-Management Relations (Committee Print, 82d Congress, 2d Session, pp. 11-15) as follows:

If exceptions are taken to the intermediate report, the case goes to the Board. The executive secretary assigns the cases, in order of receipt, to the Board member who has indicated his availability for assignment of an unfair labor practice case. The major administrative responsibility for processing the case falls on the chief legal assistant to the Board member who happens to be the chairman of the panel to which the case has been assigned. The detailed review of the record in

the case is made by the legal assistant under the supervision of a supervisor and the chief legal assistant. After a draft of the proposed decision has cleared within the panel chairman's office, it is circulated among the Board members who are part of the panel, and there it is reviewed by the respective legal staffs.

The case is then scheduled for the agenda of the so-called subpanel which is made up of the chief legal assistants of the Board members participating in the panel who have consulted with their principals in the meantime and are fully informed on their positions.

Also present are the legal assistant who has read the record and his supervisor. If there is agreement on the approach to the case in question, a proposed decision based on principles drafted and circulated will be assented to. If, however, in the opinion of a Board member the case should be decided by the full Board, the case is put on the agenda of the meeting of the full Board, and a memorandum is prepared on the points at issue, which constitutes the basis of discussion among the Board members themselves.

At the full Board meeting, the case is discussed, decided and it is indicated who will dissent if there are any dissents. Drafts of the majority and dissenting opinions are circulated through the executive secretary so that each side can deal with the issues raised by the other side. The Board's decision order and accompanying opinions are issued.

The sheer weight of the Board members' legal machinery imposes delaying factors over and beyond that required by the process of reviewing intermediate reports. Each Board member has a legal staff of 18 professional people which includes a chief legal assistant, 3 supervisors and 14 legal assistants. The staff have been reduced as a result of budget cuts since this was written but the magnitude of reduction does not affect this analysis. In addition, there are a solicitor and associate solicitor functioning as a legal adviser to the Board members as a whole.

The size of the legal staff attached to each Board member's office is inherent in the act which prohibits a pool of attorneys in the service of the Board as a whole. I have no evidence that, given the existing case load, the number of legal assistants in the respective Board member's staff is excessive or insufficient.

It is manifestly impossible for the Board members to deal with 14 different legal assistants, and the need is self-evident, therefore, for tiers of authority between the Board member and the lower echelons of his staff. But, the mere existence of a staff of this size in each Board member's office consumes time in such activities as clearances, conferences, and transporting papers from one office to another office. It is important to recall that this up-and-down movement of papers is likely to be duplicated in each of the additional Board members' offices who are on the panel; and if the case involves the full Board, then the movement from legal assistant to supervisor to chief legal assistant to Board member is multiplied fivefold. This does not take into account the role of the office of the executive secretary which is the hub of all of this activity. Yet, it is difficult to see what alternatives there are under the law.

As it is now, a detailed review of the record is made by only one person—the legal assistant attached to the Board member's staff, who heads a particular panel. If the Board interpreted its responsibility to re-

quire 3 or 5 legal assistants each engaged in a page-by-page reading of the record, the condition of the Board's docket would border on the impossible.

Basically, the massive proportions of the legal machinery are attributable to a condition over which the Board has no control, or, at least, only partial control. It is a mass production judicial agency. In fiscal year 1950, the five-member Board issued decisions in 2,951 cases of all types. In one form or another, Board members were responsible for rendering personal judgment on 60 cases a week more or less, not counting their deliberations on actions subsequent to decision and the administrative details involved in running an agency with several hundred employees. The Board's decisions must rigorously justify the findings of fact with an opinion on each finding and a resolution of every conflict on which the decision hinges.

This case load exceeds the total number of appeals and proceedings commenced in all of the 11 circuit courts of appeals in fiscal year 1950. (Report of the Administrative Office of the United States Courts, p. 132, 1950 fiscal year.) At the end of 1950, there were 65 judgeships to handle this case load.

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The foregoing reports pose the problem. What is the solution? Many suggestions have been made.

One (patterned on the provisions of the Model State Administrative Procedure Act, referred to *supra*) would require that the Board submit to the parties proposed findings of fact and conclusions of law, which might be prepared by staff assistants. Thereafter, counsel for the parties would have an opportunity to present arguments on such proposed findings to the members of the Board themselves; and, finally, the members of the Board would be required to personally consider such portions of the record as might be cited by the parties. Would this be practical? Remembering that a Board member may have to pass on 50 or 60 cases a week, what would his situation be if he were asked to examine even 100 pages of transcript in each case?

Another suggestion is that the case memoranda prepared by the Board's legal assistants be made available to counsel for the parties. Then, if counsel believed that the analysis of the case by the legal assistants contained errors or important omissions, counsel would have an opportunity to submit to members of the Board a memorandum directing their attention to such specific points as were deemed of controlling importance.

A third suggestion, originating with the 1941 report of the minority of the Attorney General's Committee on Administrative Procedure, would be to provide that initial decision should be made not by the Board but by an independent hearing officer, whose decision would be the final administrative decision, except that an opportunity would be afforded for limited review by the Board, which would act as a special appellate tribunal, considering only the specific assignments of error which had been made.

**Hoover Commission Task Force Recommendation.**

This last suggestion was the subject of intensive study by the Hoover Commission Task Force on Legal Services and Procedure, which (Report, p. 201—1955) made the following observations:

**RECOMMENDATION NO. 48**

*In adjudication and rule making required under the Constitution or by statute to be made after hearing, in which the agency has not presided at the reception of the evidence, the presiding officer should prepare and file an initial decision.*

**The Problem.**

An initial decision is one which is made on the record of the hearing, with appropriate findings of fact, conclusions of law, and an order. The initial decision becomes the final decision of the agency unless it is set aside by the agency upon review. This type of decision differs from the recommended decision, which does not possess finality and in which the hearing examiner merely hears the evidence and prepares a record for action by the agency.

The initial decision is presently used in 11 statutory proceedings. . . . In nine others, the hearing examiner may prepare a recommended decision. In the opinion of the task force presiding officers in all cases other than those in which the agency itself hears the evidence should, in the interest of maximum due process and efficiency, prepare and file initial decisions.

Delays in the administrative process often arise out of the practice common to many agencies, of utilizing hearing examiners to conduct hearings, but not to contribute in any important degree to the process of decision. Due process requires that a hearing be granted. The agency meets this requirement, in a technical sense, by assigning an individual to receive evidence. But the agency makes its own evaluation of that evidence, without hearing or seeing the witnesses. The party who has conscientiously presented his case to the hearing officer may feel, in such instances, that the hearing was only a formal prerequisite to independent fact finding by the agency.

In some agencies like the Interstate Commerce Commission, moreover, the record made by the hearing officer is often subject to further review by other officers who have not heard the evidence, before the record is submitted to the agency for final decision. This practice tends to weaken the administrative process by diminishing the responsibility and status of the officer who conducts the hearing.

The person best qualified, apart from special circumstances, to arrive at a correct decision in an adversary matter is the person who actually hears and receives the evidence. This is true for two primary reasons. First, he actually hears all the evidence, unlike a reviewing authority which may pass over portions of the record which appear to be relatively unimportant. Second, he has an opportunity to judge the weight to be given to the testimony of witnesses on the basis of their demeanor. Only extraordinary reasons should justify departure from this principle, see *Morgan v. U. S.*, 298 U. S. 468 (1936).

This does not, of course, affect the determination of policy questions delegated by Congress to an agency. As a general proposition, it cannot be questioned that Congress normally intends the heads of the several agencies to determine policy, to promulgate rules, and to finally decide controversies. But it is equally clear that Congress does not expect



hearings in particular cases to be conducted by the agency itself, or that the agency should have the burden of deciding every case without the assistance of a decision initially rendered by the officer who conducted the hearing.

#### Conclusions.

Administrative agencies should conduct formal adjudicatory proceedings, so far as possible, in accordance with the established pattern of court actions. Cases should be heard by persons who are qualified by training and experience to rule upon the admissibility of evidence and to conduct hearings in conformity with the time-tested judicial procedures. Hearings should be conducted by officers who are trained in the law, and who are qualified and empowered to formulate decisions, predicated upon the evidence they hear and receive and the findings of fact they properly deduce therefrom.

In all cases other than those in which the agency itself or one or more of its members hear the evidence, presiding officers who conduct hearings, receive evidence, and formulate findings of fact should prepare an initial decision. In the absence of an appeal to the agency or review upon motion of the agency, every such initial decision should without further proceeding become the decision of the agency.

The person who actually hears the evidence should participate directly in the process of decision. The uniform requirement that presiding officers prepare the initial decision of the agency in formal adjudication will place responsibility for decision where it properly belongs in the first instance—upon the officer whose special function it is to conduct the administrative hearing. The use of the initial decision will permit the elimination of elaborate administrative review procedures, with attendant delay and expense to private parties and the Government. And it will free the agency from the heavy burden of intensively re-examining the full record of all cases submitted to it for final decision.

#### RECOMMENDATION NO. 49

*Upon review of an initial decision of a presiding officer in adjudication or rule making required under the Constitution or by statute to be made after hearing, except for questions of policy delegated to the agency by the Congress, the agency should have only the powers of review that a court has upon judicial review of agency decisions.*

#### The Problem.

The relationship between subordinate presiding officers and the agency will, in large part, be determined by the extent to which a decision of the former is accorded administrative conclusiveness. Under the Administrative Procedure Act, as presently enacted, decisions of such officers in adjudication and rule making are subject to complete review on the facts, law, and exercise of discretion.

Under section 7 (a) of the statute, 5 USC § 1006 (a) (1952), where the agency has not presided in formal adjudication, the hearing officer usually renders a recommended decision. He may also enter an initial decision, final unless appealed to, or reviewed by the agency. But even the initial decision is restricted by two further provisions of the statute. First, an agency may, by general rule or by order in a particular case, take the decision from the presiding officer and render the initial decision itself. Second, even where such an officer renders an initial decision, "the agency shall . . . have all the powers which it would have in making the initial decision." In rule making and determining applications for initial licenses, the agency or a responsible officer there-



of may issue a tentative decision, although such intermediate procedure may be wholly omitted in any case in which the agency finds on the record that the execution of its functions imperatively and unavoidably so requires.

Congress intended that agency review powers should not mean that initial decisions were to be without effect. Especially where "issues of fact are sharply controverted or the case or class of cases tends to become accusatory in nature," the decisions of subordinate presiding officers should be final subject only to review by the agency, Sen. Doc. 248, 79th Cong., 2d sess. 209-210 (1946).

#### Review of Rule Making Decisions.

A primary responsibility of every regulatory agency is sublegislation, that is, the implementation of legislation through the issuance of rules of general applicability. The legislature confers such authority upon agencies for the reason that the details of regulation constitute too great a burden for the principal lawmaking body. Where standards are precise, and delegated authority adequately circumscribed, such grants of rule making authority are sound and beneficial. Rules may be adopted after participation in the process by persons affected by the rules, or even after formal hearing. In either event, the making of the rule involves policy considerations which justify independent appraisal of pertinent facts and circumstances by the agency. In the review of initial decisions in rule making, agencies should therefore have all the powers which they would have in making the initial decisions themselves.

#### Review of Adjudicatory Decisions.

Where the initial decision is made by a hearing officer in an adjudicatory matter, however, a different scope of review is called for. The proceeding is not primarily one to determine policy but, rather, to adjudicate rights under existing law and policy. The initial decision of the hearing officer should, therefore, stand unless it is contrary to law or previously declared agency rule. The decision should only be set aside if clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record, and, to the extent that discretion is involved, if it constitutes an abuse or clearly unwarranted exercise of discretion. The agency should not otherwise substitute its judgment for the judgment of the officer who conducted the hearing and heard and received the evidence, except as to questions of policy which have been committed by statute to the agency for its consideration.

This principle of limited agency review of the initial decisions of hearing officers is a corollary to the principle that hearing officers should file such decisions. Indeed, without placing some reasonable limitation upon the scope of agency review of the decisions of hearing officers, the initial decision could itself be reduced to mere form. The basic theory of the initial decision is that it should stand as the final action of the agency unless, for good reason, the agency should modify it or set it aside.

#### Conclusions.

The task force recommends that in matters of adjudication, as distinguished from rule making, the primary power of decision should be vested in hearing commissioners. The decisions of such officers should conform in general to the decisions of trial judges in cases tried in court without a jury. Such officers should, therefore, in every case prepare and file findings of fact and an order or other form of initial decision.

The initial decision of the presiding officer should, in the interest of maximum protection of private and governmental rights, be subject to two forms of judicial review, just as decisions of inferior courts are usually twice reviewed. The protection afforded by dual review lies in the respective functions of agency and court. The agency has technical knowledge in the field of its special competence. It is concerned primarily with the wise exercise of administrative discretion, in accordance with statute. The court is the guardian of due process of law. It is concerned primarily that the action taken is within statutory authority, that the procedures are fair, that the evidence supports the findings, and that the order follows logically from the findings.

Review of the decision of the hearing officer by the agency is essential to prevent that officer from, in effect, displacing the agency in matters of adjudication and executive policy. Review of the decision of the agency by the court is essential to prevent errors of law from pervading the administrative process. While the objectives sought to be served by administrative and judicial review of the initial decisions of hearing officers are not, thus, precisely the same, no reason exists why any substantial difference in the scope of review should exist between agency and court.

Once the basic proposition is accepted that the quasi-judicial functions of administrative agencies should closely approximate accepted judicial practices, and that the person who conducts hearings on behalf of agencies should file initial decisions to become the final action of the agency in the absence of agency review, the initial decision will become the primary step in the adjudicatory process and will stand unless reversed or modified for substantial cause upon administrative or judicial review. The task force therefore proposes that the scope of agency review of the initial decisions of hearing officers conform with the scope of judicial review of the final decisions of the agency, except as to questions of policy which have been committed by statute to the agency for its determination.<sup>9</sup>

## SECTION 2. EVIDENCE

### Presumptions and Burden of Proof

**Mountain Ice Co. v. Durkin, Supreme Court of New Jersey, 1928. 6 N. J. Misc. 1111, 144 Atl. 6.**

PER CURIAM. This is a workmen's compensation case. The certiorari was allowed to review a judgment of the Essex court of common pleas, affirming an award made in the Workmen's Compensation Bureau to the petitioner, as the widow and children of Martin Durkin, deceased. It is sought to reverse the judgment on the ground that the petitioner's case is entirely barren of any proof of an accident. So, it is argued, there is nothing to indicate that at the time of the alleged injury, the decedent was doing any particular thing, as a part of his

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<sup>9</sup> The problem is further discussed by Cooper, "Let Him Who Hears Decide," 41 A. B. A. J. 705 (1955); and Schwartz, "Institutional Administrative Decisions," 4 Journal of Public Law 49 (1955).

work or otherwise. Not so. The record discloses these facts: The deceased was discovered by Michael Bohen, a fellow worker, about 10:30 a. m., February 27, 1927, in No. 1 storehouse on prosecutor's premises, lying on the floor; he was in an unconscious condition; was carried to the boiler room of the plant, and later to the City Hospital. He was received at the City Hospital almost totally unconscious. There were lacerations on the forehead; no evidence of alcohol or intoxication. Decedent died on March 2, 1927. Dr. Harrison Martland performed an autopsy on the body the following day. He gave the cause of death as follows:

"I found the man died as the result of traumatic cerebral multiple hemorrhages due to a blow or external violence, which he received in the front part of his head where there was a large laceration. He also had a fracture of the pelvis."

The deceased worked as a watchman and fireman for the prosecutor, and at the time immediately preceding the accident, from which death resulted, his hours were from 7 a. m. until 3 p. m. every day except Sunday when his hours were from 7 a. m. to 7 p. m. He left the plant of the company on Saturday, February 26, 1927, and was to return on Sunday, the following morning, at 7 a. m. Joseph Burness, another night watchman employed by the company, testified that on the night of February 26th he closed all the doors of the plant; that he opened the front door between 6:30 a. m. and 7 a. m. Sunday morning expecting Durkin to come in some time between 6:30 and 7 o'clock. No. 1 storehouse where Durkin's body was found adjoined another building in the plant, known as the blower room; between the blower room and the storehouse there was a door opening from the storehouse into the blower room. This doorway entered the storehouse at a point about 35 feet above the floor of the latter, and gave access to a platform about 3 feet wide and about 4 or 5 feet high. The deceased was found in an unconscious condition, and almost directly beneath this platform. On the other side of the door entering the blower room, there were steps leading to the floor of that room. Durkin, when found, was dressed in his street clothes. It was customary, when he relieved Burness, for him to go upstairs, change his clothes and come down to the boiler room. The locker room was upstairs. To get to the locker room one had to pass through the tank into the blower room, and the locker room was at the head of the boiler room. One might get there by an elevator.

The presence of the body bearing injuries which would result from a fall immediately beneath the platform 35 feet above from which an open door led to a room to which he had access, raises a legitimate inference that he died as the result of a fall from the platform. The

deceased was a watchman, the very character of his employment would require him to enter any portion of the company's premises, where his presence might be of benefit to his employer's interest. A case in point is that of *Atchison v. Colgate Co.*, 3 N. J. Misc. 451, 128 Atl. 598, aff'd 102 N. J. L. 425, 131 Atl. 921; so is *Manziano v. Public Service Gas Co.*, 92 N. J. L. 322, 105 Atl. 484.

What was said by this court in a recent case, *Pearson v. Armstrong Cork Co.*, No. 207, 6 N. J. Misc. 976, 143 Atl. 449, October Term, 1928, is pertinent; when two independent and distinct tribunals, such as these, have examined the facts and heard the testimony, we do not think that a conclusion so reached should be lightly disturbed by this court. . . .

The judgment of the Essex county court of common pleas is affirmed.<sup>10</sup>

### **Statutory Presumptions and Provisions Concerning Burden of Proof.**

It has become fairly common practice to shift the burden of proof in administrative cases in such a fashion as to better accomplish the desired ends of the legislation. In some instances the burden of proof is shifted for the purposes of all proceedings arising under the act including proceedings before the Commission itself; in other instances the burden is adjusted to favor the administrative decision in the event of an appeal therefrom to the courts.

The New York Workmen's Compensation Act provides an illustration of the first type. Section 21 of that act makes the following provision concerning presumptions:

"In any proceeding for the enforcement of a claim for compensation under this chapter, it shall be presumed in the absence of substantial evidence to the contrary

1. That the claim comes within the provision of this chapter;
2. That sufficient notice thereof was given;
3. That the injury was not occasioned by the willful intention of the injured employee to bring about the injury or death of himself or of another;
4. That the injury did not result solely from the intoxication of the injured employee while on duty. . . ."

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<sup>10</sup> The principal case is commented upon in 27 Mich. L. Rev. 944 (1929).

A more conservative view as to the use of circumstantial evidence in such cases is reflected in *Sparks v. Consolidated Indiana Coal Co.*, 195 Iowa 334, 190 N. W. 593 (1922). See Comment in 21 Mich. L. Rev. 613 (1923).

A fairly detailed understanding of the problems confronting a compensation commission will serve a useful purpose in evaluating the applicability of common-law standards of proof to compensation cases. For a thorough study of a typical compensation procedure, see Brown, "The Administration of Workmen's Compensation in Wisconsin," 10 Wis. L. Rev. 340, 431 (1935).

An almost identical provision is found in section 20 of the federal Longshoremen's and Harbor Workers' Compensation Act (33 USCA § 920). Similar provisions also appear in other compensation acts.

The public utilities commission acts provide illustration of the second type of presumption statute. These acts almost universally contain provisions placing the burden of proof upon appeal upon the utilities, thus favoring the Commissions in all review proceedings arising under the acts. A typical utility commission act provision is found in section 68 of the Illinois Commerce Commission Act [Ill. Rev. Stat. ch. 111½, § 74; Jones Ill. Stats. Ann. 112.093], reading as follows:

" . . . Rules, regulations, orders or decisions of the Commission shall be held to be *prima facie* reasonable, and the burden of proof upon all issues raised by the appeal shall be upon the person or corporation appealing from such rules, regulations, orders or decisions. . . ."

Statutory presumption provisions of this type, i. e., those placing the burden of proof on the one who appeals from an adverse decision of an administrative tribunal, really accomplish no more than an affirmation of the long recognized rule that an official act shall be presumed to be correct until the contrary is shown. The asserted justification for such a rule lies not so much in the idea that official action is necessarily unimpeachable, as it does in the claimed necessity of equalizing the effectiveness of the opposing parties. It places the governmental organ in a favorable strategic position to compete on an equal or preferred footing with the private interest. On this point PROFESSOR FREUND has spoken as follows:

"As against a public authority which is poorly equipped for obtaining the requisite information, the shifting of the burden of proof may be legitimate enough, and may not even neutralize entirely the advantage which the carrier has in establishing his case. But where the public authority is organized with so elaborate a machinery of supervision as the Interstate Commerce Commission, the position with reference to obtaining data for judgment is very much equalized, and complex factors being marshalled against complex factors with equal competence and skill, the burden of proof may be impossible to meet. . . . Is it a tenable theory of the relation between government and business which leaves to the owner all risk and responsibility, and permits an administrative authority to say: 'Prove your case, or we will not allow you to act.'?" Freund, "The Growth of American Administrative Law," 1923, p. 37.

However, the actual effect of such provisions in the disposition of public utility cases is not great. In ordinary utility commission proceedings there is an abundance of evidence on both sides of the controverted issues and in such cases the *locus* of the burden of proof

has a tendency to vanish as a controlling factor in the decisions. Only when evidence is meager or totally lacking does the shifting of the burden become of real importance."<sup>1</sup>

A notable departure from the practices set forth in the preceding paragraphs appears in the Federal Administrative Procedure Act. By section 7 (c) of that act it is specifically provided that "except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof." In general this places the burden squarely upon the administrative agency to defend the position it has taken in a rule or order and this is precisely contrary to presumption of correctness above referred to.

**Joseph v. United Kimono Co., Supreme Court of New York, Appellate Division, Third Department, 1921. 194 App. Div. 568, 185 N. Y. Supp. 700.**

Appeal from an award of the State Industrial Commission.

HENRY T. KELLOGG, J. The work of the deceased employee was performed upon the ninth floor of a factory building. He was engaged as a foreman in working upon a machine and in handing out work to the women there employed. On the morning of the day of the accident he complained frequently of pains in his head. He nevertheless continued at work until the early part of the afternoon. At this time one of the factory hands saw him leave the room where he worked and go into an adjoining room, holding his hand to his head as he went. This room was used for showing the factory product, and was empty at the time. It was lighted by a single window, 7 feet high by 4 feet wide, which was usually kept closed. The window sill was 3 feet wide, and stood 2 feet 6 inches above the floor. In close proximity to it, and running along its entire width, was a radiator, which was 2 feet

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<sup>1</sup> At one point in public utility regulation, however, the location of the burden of proof is of importance. It has become common practice for utility holding companies to charge their subsidiary operating companies for various kinds of services—financial services, technical research services, etc. Obviously unless these charges can be kept at a reasonable figure the regulation of the operating company by the Utility Commission is rendered in large measure ineffective. Since the holding company is usually not subject to the jurisdiction of the Commission having jurisdiction over the operating company, it becomes a matter of importance to determine whether the operating company has the burden of proving the reasonableness of the holding company charge, or the Commission has the burden of establishing its unreasonableness. For years the answer to this question was in doubt and the problem puzzled the Commissions. See *Re Wisconsin Tel. Co. (Wis.)*, P. U. R. 1925 D, 661, 674. The recent decision in *Smith v. Illinois Bell Tel. Co.*, 282 U. S. 133, 75 L. Ed. 255, 51 S. Ct. 65 (1930), has apparently disposed of the question favorably to the Commissions, for it has the effect of casting the burden on the company, thereby relieving the Commission of a virtually impossible task. See Treadway, "Burden of Proof in Rate Cases Involving Intercorporate Charges," 31 Mich. L. Rev. 16 (1932).

high and 8 inches wide. The deceased had frequently been seen eating his lunch sitting on the sill of the window. Within about five minutes of his leaving the workroom, one of his employers, observing that the women in a factory on the opposite side of the street were at its windows screaming out excitedly, looked down upon the street and saw the body of the deceased lying on the sidewalk directly below the showroom window. One of the partners then rushed through the factory, crying out that the deceased had "jumped out" or "must have jumped out" the window. The deceased, when picked up, was found still to be alive, but died within a few minutes. After hearing the proof upon the claim filed for his death, the Industrial Commission made an award, finding, among other things, that the deceased "was afflicted with vertigo or fainting, and as a result he fell from the window to the street, and received injuries as a result thereof, from which he died one hour later."

It having become firmly established that the occurrence of accidents causing compensable injuries may never be presumed, but must always be proven, the sole question here arising is whether the known facts of the case permitted the inference drawn by the Commission that the deceased came to his death from an accident attributable to his employment. The distance from the floor to the top of the radiator and across the window sill to its outer edge was at least 6 feet and 2 inches, so that it is apparent that the deceased could not, while standing on the floor, and leaning out the window for the fresh air, accidentally have fallen through the opening. It might be reasoned that the deceased, in a crazed condition caused by the pains in his head, had rushed to the window and thrown himself therefrom. If this were the fact, then either the deceased consciously intended to commit suicide, or, if temporarily insane, was impelled to throw himself from the window by causes not attributable to his employment so that in neither case could there be a recovery. It might be thought that the deceased stepped upon the sill to open the window, and, having raised it, fell down and rolled out through the opening over the ledge. It might be thought that the deceased, having opened the window, sat down upon the sill to rest, and voluntarily or involuntarily so moved that his body went over the edge. The difficulty with either set of facts, which might thus be surmised to have occurred, is that they leave unanswered the vital question: Did the deceased fall down, or roll off, or move off the window ledge accidentally, or by reason of an attack of vertigo or fainting?

The Industrial Commission has found that the latter was the case; but, since the vertigo or fainting was in no wise caused by the employment, that answer to the question would be destructive of the claim. *Minerly v. Kingsbury Construction Co.*, 191 App. Div. 618; *Neuberger v. Third Avenue Ry. Co.*, 192 App. Div. 781. The alternative answer

that the deceased accidentally fell or rolled off, without having been affected by vertigo or fainting, cannot be made, because the facts do not give rise to that inference with any greater certainty than to the inference drawn by the Commission, and it is a well-settled principle that, of two equally probable inferences, a trier of fact may not employ that which spells liability in preference to that which proves its opposite. It seems to me that from this meager proof no inference of fact can justly be made that the accident which occurred to the deceased arose from any cause connected with his employment, and therefore that the claim must fail.

The award should be reversed, and the claim dismissed.

COCHRANE and KILEY, JJ., concur.

JOHN M. KELLOGG, P. J. (dissenting). On the authority of *Santacroce v. Sag Harbor Brick Works*, 182 App. Div. 442; *Lingest v. Holler*, 178 App. Div. 317; *Driscoll v. Henry Gillen & Sons, Lighterage, Inc.*, 187 App. Div. 908, and 226 N. Y. 568; *Vogel v. American Chiclé Co.*, 190 App. Div. 797; and *Chludzinski v. Standard Oil Co.*, 176 App. Div. 87, I dissent. It is not probable that the deceased intended to commit suicide; there is no suggestion that he was crazy. He was upon the ninth floor of a building, and evidently went to the window for fresh air to relieve his headache. He frequently sat in the window for luncheon and the air. He may have been careless, but the Commission was justified in finding that the death was accidental. We cannot review the question of fact.

In construing this remedial statute, where all reasonable intendments are in favor of the employee, I fear we are leaning backwards and adopting a more stringent rule than would prevail in an ordinary action of negligence. In death cases, where there is no eyewitness to the accident, it is impossible to prove the exact condition, inferences may play a controlling part, and slight inferences create a question of fact upon which a judgment may well stand. *Noble v. N. Y. C. & H. R. R. Co.*, 20 App. Div. 40, and 161 N. Y. 620; *Fordham v. Gouverneur Village*, 160 N. Y. 541. This rule is upon the theory that the deceased cannot speak, but that if he could speak he probably would be able to give a good account of himself. *Mullen v. Schenectady Ry. Co.*, 214 N. Y. 300, 305, and cases there cited.

In *Santacroce v. Sag Harbor Brick Works*, *supra*, an employee was working upon a pile of brick about 15 feet above the ground, and was seized with an attack of vertigo, or with some similar disorder, which caused him to fall to the frozen ground. It was held that the evidence justified the conclusion that he became dizzy and fell, and the award was affirmed by us unanimously. In *Driscoll v. Henry Gillen & Sons*, *supra*, an award for death benefits was sustained, where the captain of a lighter was last seen on January 29th, at 6 o'clock p. m., going towards his boat. His dead body was found in the water near the boat on May 2d.



In a common-law action the plaintiff can recover only upon a preponderance of evidence, and the Appellate Division, upon reviewing his judgment, may reweigh the evidence, and if it is satisfied that there is not a fair preponderance may reverse it. In compensation appeals we are denied that privilege. So far as the facts are concerned, we can only inquire whether there is any fact proved which in itself, or from reasonable inferences from it, tend to support the finding. If there is no fact or inference which justifies the finding, it is erroneous as matter of law and we may reverse it. Here, at the worst, some facts and some inferences from them indicate an accidental death as found. It was claimed before the Commission that some other facts and some other inferences lead in the opposite direction; but we cannot enter upon that situation. Our power ceases when we discover that there are some facts and some inferences which tend to support the award. In a conflict as to the facts and the inferences to be drawn, the Commission has a certain benefit from the presumption raised by section 21 of the law (Consol. Laws, c. 67).

I favor an affirmance.

WOODWARD, J., concurs.<sup>12</sup>

**Del Vecchio v. Bowers, Supreme Court of the United States, 1935.  
296 U. S. 280, 80 L. Ed. 229, 56 S. Ct. 190.**

[Suit by Bonnie L. Bowers against D. Del Vecchio and others, to set aside a decision of the Deputy Commissioner denying compensation for the death of plaintiff's husband, Jeff Bowers. . . .]

MR. JUSTICE ROBERTS delivered the opinion of the court.

This case involves the application of sections 3 (b) and 20 (d) of the Longshoremen's and Harbor Workers' Compensation Act to the respondent's claim of compensation for the death of her husband, Jeff Bowers, who died from a bullet wound inflicted while he was on duty in Del Vecchio's store in the District of Columbia.<sup>13</sup>

Evidence adduced at the hearing before a Deputy Compensation Commissioner tended to establish the following facts: On the morning of September 10, 1931, Bowers discovered a broken fastening on a door leading into an alley in the rear of the premises and engaged a carpenter to make repairs. The latter, while so occupied, hearing a sound like the bursting of an electric light bulb, followed by groans, entered the store and found Bowers lying on the floor. Death ensued without recovery of consciousness. An automatic pistol, owned by the decedent, which he kept in a drawer under a counter, was found in the

<sup>12</sup> See Sherman, "Evidence and Proof Under Workmen's Compensation Laws," 68 U. of Pa. L. Rev. 203 (1920).

<sup>13</sup> The Longshoremen's and Harbor Workers' Compensation Act is also the workmen's compensation law for the District of Columbia by the Act of May 17, 1928, c. 612, 45 Stat. 600 (D. C. Code 1929, T. 19, §§11, 12, 33 USCA § 901 note).

partly closed drawer. There was blood in the drawer and on the counter near it. The bullet had entered the chest about three and one-half inches to the left of the median line and one inch above the nipple, emerged from the back of the body approximately in line with the point of entrance, and lodged in a paint can on a shelf behind the drawer about five feet above the floor. The ejected shell lay some twelve feet to the left of the drawer where it would naturally fall if the decedent had stood in front of the drawer, between the counter and the shelf, and held the pistol in his right hand pointing at his chest. Ballistic tests traced shell and bullet to the pistol. There were no identifiable fingerprints upon the weapon, but an indistinct print of the side of a finger was discernible. The front of Bowers' shirt bore grains of unburned powder which, with the condition of the material about the hole in the garment, indicated that the muzzle of the weapon had been held within two or three inches of the body. No rags or other material were discovered such as would suggest that Bowers was cleaning the pistol. The victim of such wound could have taken the few steps from the place where the gun was found to that where his body lay.

The parties agree the injury was self-inflicted, but are in controversy as to whether it was accidental or intentional. According to the respondent's evidence, Bowers was in good health, of a happy disposition, and in good financial condition; his accounts were in order; on the evening before his death he had written to his mother a cheerful letter in which he stated he would soon write her again; and the same evening he had promised a friend to bring him from the store some goods which the friend desired to purchase. The petitioners adduced evidence that Bowers had suffered from an infection of the ear and undergone a mastoid operation; about ten days before his death he visited a specialist to whom he complained of pain in the ear and headaches which seemed to be increasing. He was advised another mastoid operation might be necessary and was sent to a hospital for an X-ray examination. He submitted to the examination, which disclosed the presence of pus in the middle ear, but did not thereafter return to the physician whom he had consulted.

The Deputy Commissioner denied an award of compensation, holding claimant had failed to establish that Bowers' duties required the use of a weapon and there was therefore no showing that his injury arose out of his employment. Upon a bill filed, the Supreme Court of the District set aside the order, holding the keeping of the pistol in the store, although unknown to the employer, was in furtherance of the latter's interest, the finding to the contrary was wholly unsupported, and the evidence tended to prove the death was due to accident. The Court of Appeals concurred in the view that an award should not have been refused on the ground that the injury did not arise out of the employment; but as the case was tried on the theory of suicide, and the Deputy

Commissioner had made no finding upon this issue, remanded the cause for further findings.

The Deputy Commissioner reconsidered the case upon the record as originally made before him and, finding the death suicidal, again refused an award. The respondent then instituted the present proceeding to have this action set aside. The Supreme Court denied relief, but the Court of Appeals reversed, declaring the finding of suicide not to be in accordance with law because, though the act withholds compensation where an employee willfully kills himself, section 20 (d) creates a presumption, in the absence of substantial evidence to the contrary, that the injury was not willfully inflicted.<sup>14</sup> The court found the evidence as consistent with accident as with suicide and said that in such circumstances the presumption required a finding in favor of the claimant; adding that whatever measure of proof may generally suffice to support other findings of a deputy commissioner, a finding of suicide, in the absence of substantial evidence, is not in accordance with law. Substantial evidence, said the court, must be such as to induce conviction and the evidence upon which the officer here acted did not reach that standard. . . .

We hold that the decision of the Deputy Commissioner should not have been annulled. The relevant substantive section of the act directs that no compensation shall be payable if the injury was occasioned by the willful intention of the employee to injure or kill himself; the adjective section creates a presumption that the injury was not so occasioned, in the absence of substantial evidence to the contrary. The question is whether, as the court below thought, the presumption has the quality of affirmative evidence. The answer must be that it has not.

When a trier of facts is to be persuaded of the truth of a disputed proposition, one or the other of the parties, the proponent or the opponent, has the burden of going forward with evidence. In the present instance, the fact that the wound was self-inflicted permits but one of two conclusions; either the decedent accidentally killed himself, or he committed suicide. Considerations of fairness and experience in human affairs induce fact-finding bodies, where there is a balance of probability, to adopt a working assumption as a basis of a conclusion, unless and until the facts are developed by evidence. The natural love of life, the comparative infrequency of suicide as contrasted with accident, and the likelihood that testimony as to the cause of death would be more readily available to the employer than to the claimant justify a presumption, which the law indulges in such a case, that the death was

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<sup>14</sup> Section 20 (d), USC tit. 33, § 920 (d), 33 USCA § 920 (d): "In any proceeding for the enforcement of a claim for compensation . . . it shall be presumed, in the absence of substantial evidence to the contrary . . . (d) That the injury was not occasioned by the willful intention of the injured employee to injure or kill himself or another."

accidental. The act under consideration, however, does not leave the matter to be determined by the general principles of law, but announces its own rule, to the effect that the claimant, in the absence of substantial evidence to the contrary, shall have the benefit of the presumption of accidental death. The employer must rebut this *prima facie* case. The statement in the act that the evidence to overcome the effect of the presumption must be substantial adds nothing to the well-understood principle that a finding must be supported by evidence. Once the employer has carried his burden by offering testimony sufficient to justify a finding of suicide, the presumption falls out of the case. It never had and cannot acquire the attribute of evidence in the claimant's favor. Its only office is to control the result where there is an entire lack of competent evidence. If the employer alone adduces evidence which tends to support the theory of suicide, the case must be decided upon that evidence. Where the claimant offers substantial evidence in opposition, as was the case here, the issue must be resolved upon the whole body of proof pro and con; and if it permits an inference either way upon the question of suicide, the Deputy Commissioner and he alone is empowered to draw the inference; his decision as to the weight of the evidence may not be disturbed by the court.

For these reasons, we are of opinion the Court of Appeals erred in holding that as the evidence on the issue of accident or suicide was, in its judgment, evenly balanced, the presumption must tip the scales in favor of accident. The only matter for decision was whether the affirmative finding of suicide was supported by evidence. It is clear that it was so supported and that the court should therefore not have set aside the Deputy Commissioner's order.

The judgment must be reversed and the cause remanded for further proceedings in conformity with this opinion.

So ordered.<sup>15</sup>

### **Equally Balanced Inferences.**

Three problems are involved in the resolution of the much mooted question as to whether an agency may, in a situation where contradictory inferences are equally valid, choose that inference which imposes liability, viz.:

1. May an agency shift the burden of proof to respondent?
2. Is it for the agency or the court to decide whether the inferences are equally balanced?
3. How should the courts apply, in this situation, the rules that an agency's findings are conclusive if supported by substantial evidence?

How these three questions become intertwined may be illustrated by the following situation, based on *Riley v. Kohlenberg*, 316 Mich. 144, 25 N. W. (2d) 144 (1946). Two men, employees of a moving company,

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<sup>15</sup> The principal case is commented upon in 34 Mich. L. Rev. 878 (1936).

were carrying a heavy davenport up a stairway. The man carrying the back, or lower end, suddenly let go the davenport, and fell to the bottom of the stairs. The man carrying the forward, or upper end of the davenport, testified that: (1) the stairs were freshly waxed and slippery; (2) when he felt the davenport sag, he turned his head and saw his companion falling downstairs; (3) by the time he reached his companion, the latter was dead. The proofs also established that decedent had a cardiac condition, and was subject to fainting spells. Medical testimony indicated that death could have been caused either by a skull concussion suffered in the fall or by a heart attack. The Workmen's Compensation Commission found that the death was accidentally caused in the course of employment, as a result of slipping.

Respondent insurance company would argue that the Commission in effect imposed upon it the burden of proving that the death was not accidental, and that this was error.

The Commission, rather than joining issue on this point, would probably say it did not shift the burden of proof; rather, it made a valid inference from conflicting evidence that death had been suffered as a result of slipping.

Meeting this argument respondent would contend that this is a case where equally valid inferences are contradictory, and that the Commission must choose the inference which negates liability.

The question then becomes: Is it for the court or the agency to decide whether the opposed inferences are equally persuasive? The Joseph case assumes the court may decide this. In the Del Vecchio case it was remarked that if the evidence permits either inference, the commissioner "and he alone" is empowered to draw the inference. This difference of view runs all through the cases. Which is the better view? Does it make a difference whether the record is almost barren of evidence (as in the Joseph case) or whether there is substantial evidence pointing in both directions (as in the Del Vecchio case)?

In support of the proposition that it is for the agency to decide which inference to choose, the agency may say that since there is substantial evidence to support its findings, they cannot be challenged. Does this principle apply only to so-called primary facts (e. g., that the stairs were slippery) or does it apply equally to the drawing of inferences and conclusions?

### What Evidence May Be Received

**Reck v. Whittlesberger**, Supreme Court of Michigan, 1914. 181 Mich. 463, 148 N. W. 247.

STEERE, J. This case is before us upon a writ of certiorari to review a decision or determination of the industrial accident board of Michigan affirming an award of \$2,250 made by a committee of arbitration against

Frank B. Whittlesberger, the appellant, in favor of the widow of Rudolph Reck, whose death is charged to have resulted from an injury sustained while in appellant's employ. . . .

The record discloses that on January 12, 1913, said Rudolph Reck, a baker by trade, died at a hospital in Detroit of septic pneumonia, which resulted, as his physician testified, from systemic sepsis developed from an infected wound in his hand, claimed to have been caused, on December 26, 1912, by a nail in some fuel with which he was firing an oven in appellant's bakery on Randolph street, in said city, where deceased was then employed.

The bakeshop or room in which deceased was working at the time it is alleged he sustained the initial injury was about 100 feet long and 40 feet wide, and two other bakers were at work in the room with him, a boy also being with them in the afternoon. Deceased finished his work for the day as usual, and left at the regular quitting time, which was about 7:30 p. m. His daughter testified that he arrived home that evening a little later than his customary time, and showed her an injury where he had hurt his hand at or near the thumb, stating that he chopped up a box and "ran a nail in his thumb." He worked full time at the shop the next day and until 4 p. m. the succeeding day. During this time the men with whom he worked saw and heard nothing of any accident; neither did they observe anything unusual in his work or conduct. He did not, however, return to work after December 28th, the day on which he quit at 4 o'clock.

Dr. Smith, the only medical witness who testified, first treated deceased on January 2, 1913. At that time his employer and fellow bakers were first informed of the claim that he had sustained any injury while at his work. Dr. Smith testified, as before stated, that septic trouble originating with the wound in the hand spread generally throughout the system and resulted in pneumonia, which ended fatally. This is not controverted, but it is urged that no competent evidence was produced showing where or how deceased injured his hand, or that the injury arose out of and in the course of his employment.

Following a claim regularly made for compensation by the widow under said Act No. 10, generally known as the Workmen's Compensation Act, a committee of arbitration was selected, as provided by the act, and hearings were held. One of said hearings was at the bakery where the injury was claimed to have been received. None of the employees saw the accident or were shown to have personal knowledge of when or how it occurred. The committee then threw the door wide open for hearsay evidence, and, against objection, entertained any testimony offered as to what witnesses had heard deceased and others say about it.

Appellant's assignments of error are as follows:

"First. In holding that there was sufficient proof that Rudolph Reck received a personal injury arising out of and in the course of his employment to justify a decree in favor of the claimant.

"Second. In holding that hearsay evidence offered for the purpose of proving that the deceased received a personal injury arising out of and in the course of his employment was admissible, and denying the objection of your petitioner to its admission.

"Third. In determining and ordering your petitioner to pay the said widow the sum of \$2,250, and costs, as compensation for the injury and attendant death of Rudolph Reck."

The third assignment is manifestly contingent on the other two, and calls for no separate consideration. The first and second present the two questions of whether this unrestricted admission of hearsay testimony was reversible error, and whether there was any competent evidence in the case on which to base a finding that the injury complained of arose out of, and in the course of, deceased's employment.

At the threshold of this inquiry we are confronted with the proposition that the board is made by the law creating it the final tribunal as to the facts, and, it having made a finding of facts legally sufficient to support the award, its decision cannot be questioned by the court.

Section 12 of part 3 of said act provides:

"The findings of fact made by said industrial accident board acting within its powers, shall, in the absence of fraud, be conclusive, but the Supreme Court shall have power to review questions of law involved in any final decision or determination of said industrial accident board: *Provided*, that application is made by the aggrieved party within 30 days after such determination by certiorari, mandamus or by any other method permissible under the rules and practice of said court or the laws of this state, and to make such further orders in respect thereto as justice may require."

As a legal conclusion, no one will deny that in any judicial proceeding the competency of testimony offered in support of or against any material fact is a question of law. It does not follow, however, that the appellate court in all instances must set aside an adjudication because of erroneous admission or rejection of evidence. The doctrine that prejudice is always presumed from error is not accepted by all students of jurisprudence with complacency, even in those jurisdictions where the doctrine prevails. Neither do we conceive that in reviewing decision of this board all technical rules of law, often made imperative by the precedent in reviewing the action of regularly constituted trial courts, must be applied. The board is purely a creature of statute, endowed with varied and mixed functions. Primarily it is an administrative body, created by the act to carry its provisions into effect.

Supplemental to this, in order that it may more efficiently administer the law, it is vested with *quasi* judicial powers, plenary within the limits fixed by the statute. Along the lines marked out by the act it is authorized to pass upon disagreements between employers and claimants in regard to compensation for injuries, and to that end make and adopt rules for a simple and reasonably summary procedure. Hearings are to be held upon notice to parties in interest; compulsory process for attendance of witnesses and power to administer oaths is given; the parties in interest are entitled to notice, to be heard and to submit evidence; a review, findings, a decision, and an award of compensation are provided for, though in the final test resort must be had to the courts to enforce the awards. In those proceedings the board does not act solely as a mere arbitrator. It has various plenary powers well defined, and its status is unique in the particular that it performs in combination both administrative functions and certain of the duties of a court, a referee, and an arbitration board. Its findings of facts upon hearings are conclusive, and cannot be reviewed, except for fraud, provided, necessarily, that any competent, legal evidence is produced from which such facts may be found. Facts cannot be evolved from the inner consciousness of that tribunal on bare supposition, guess, or conjecture, nor on rumor or incompetent evidence. To so determine the rights of parties would be to act outside the authority conferred by the act, and without jurisdiction.

While it was evidently the intent of this law that, by concise and plain summary proceedings, controversies arising under the act should be promptly adjusted, under a simplified procedure unhampered by the more technical forms and intervening steps which sometimes cumber and delay regular litigation, yet the language of the act, and provision for review of questions of law, indicate clearly an intent that the elementary and fundamental principles of a judicial inquiry should be observed, and that it was not the intent to throw aside all safeguards by which such investigations are recognized as best protected.

The rule against hearsay evidence is more than a mere artificial technicality of law. It is founded on the experience, common knowledge, and common conduct of mankind. Its principles are generally understood and acted upon in any important business transaction or serious affair in life. In such matters men refuse to rely on rumor or what some one has heard others say, and demand the information at first hand. . . .

In *Gilbey v. Railway Co.*, 3 B. W. C. C. 135, where a workman at a meat market on arriving home told his wife that he had broken his rib when trying to save some meat from slipping into the dirt, the court said:



"To hold such statements ought to be admitted as evidence of the origin of the facts deposed is, I think, impossible. Such a contention is contrary to all authority."

This rule is emphasized to the extent of even holding admission of such evidence reversible error in *Smith v. Hardman & Holden, Ltd.*, 6 B. W. C. C. 719, because the mind of the trial court might have been "colored by his admitting statements which are inadmissible as evidence."

We do not think, however, that under the language used in our Workmen's Compensation Act the decisions of its administrative board must be in all cases reversed under the rule of presumptive prejudice, because of error in the admission of incompetent testimony, when, in the absence of fraud, there appears in the record a legal basis for its findings, which are made "conclusive" by statute when said board acts within the scope of its authority.

As a part of the plan for a practical administration of this law, section 17 of part 3 requires each employer who elects to come under the provisions of said act to keep a record of injuries "received by his employees in the course of their employment," and within ten days after an accident resulting in personal injury to report the same in writing to the industrial accident board, on blanks printed for that purpose.

The first knowledge which came to the board of this accident is contained in the report of appellant, made by an admitted agent. It is dated January 9, 1913, and marked "First Report of Accident." It states, amongst other things, that on December 26, 1912, Reck, a baker by trade, was injured; the "cause and manner of accident" being that he "was throwing wood in furnace and a nail run in left hand inflicting a deep gash." This report was made three days before Reck's death, and indicates that the employer, or his representatives, had full notice of the injury, with ample opportunity to investigate while Reck was alive, and all sources of information were both fresh and available. A second report, after Reck's death, made on January 15, 1913, giving the same date of the accident, etc., states of its "cause and manner":

"The injured was throwing wood in the fire and a nail scratched his left hand. He worked for two or three days after the accident, when the hand became infected, and he was sent to the hospital. After the hand had started to heal nicely he contracted broncho-pneumonia, which disease caused his death January 13, 1913."

We think that such reports from the employer, where all sources of information are at his command when the reports are made, and he has had ample opportunity to satisfy himself of the facts, can properly be taken as an admission, and, at least, as *prima facie* evidence that such accident and injury occurred as reported.

No evidence was offered to impeach the reports or to show that the accident occurred otherwise than as stated in them. Eliminating from consideration the hearsay testimony erroneously admitted, which could not affect either way the legal significance of such reports, the record furnishes legal support for the findings of fact made. Consequently such findings are to be recognized as conclusive under the statute.

The decision of said industrial accident board is therefore affirmed.<sup>16</sup>

### **Statutory Relaxation of Common-Law Rules.**

Statutes setting up administrative tribunals often make express provision concerning the rules of evidence to be applied in judicial proceedings conducted by the agency. In general, such statutes serve to relax the more rigorous standards of common-law proof. Frequently, it is provided that the agency shall not be bound by the technical rules of evidence, but may rely on any relevant evidence of the sort on which responsible persons are accustomed to rely in the conduct of serious affairs.

In the early days, courts took a dim view of these statutes, sometimes refusing to give them any effect. *Matter of Carroll v. Knickerbocker Ice Co.*, 218 N. Y. 435, 113 N. E. 507 (1916); *Engelbretson v. Industrial Accident Commission*, 170 Cal. 793, 151 Pac. 421 (1915).

More recently, the trend has reversed. Occasionally, judges now say that evidence should be received in court because it would have been received by an administrative agency, e. g., *United States v. United Shoe Machinery Corp.* (D. C. Mass., 1950) 89 F. Supp. 349, 356. In a civil anti-trust suit, defendants objected to the introduction of certain documentary evidence, asserting it was hearsay. Rejecting this contention, the court said: "The original demand for administrative adjudication was traceable, in part at least, to the unwillingness of courts to admit evidence which they allowed administrative agencies to receive and act upon. And that demand would be reinforced if the courts were to continue to say that in social and economic controversies where the remedy is not imprisonment, or fine, or damages, but an order prescribing

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<sup>16</sup> For a brief view of the applicability of hearsay rules to workmen's compensation procedures, see 24 Mich. L. Rev. 831 (1926).

The courts seem inclined to hold Public Utility Commissions fairly closely to the common-law rules of evidence, even in the face of statutes which purport to authorize such Commissions to depart from common-law standards. However, the mere fact that evidence not admissible at common law is received by the Commission is not deemed reversible error, provided enough legal evidence appears in the record to sustain the Commission's findings of fact. *Williamson v. Railroad Commission*, 193 Cal. 22, 222 Pac. 803 (1924); Wigmore, "Administrative Boards and Commissions: Are the Jury Trial Rules of Evidence in Force for Their Inquiries?" 17 Ill. L. Rev. 263 (1922).

future conduct, a court sitting without a jury cannot receive hearsay evidence even though without statutory authority an administrative agency could do so. To preserve their own jurisdiction the courts must in this type of controversy relax the rigidity of the hearsay rule." Implications of the case are discussed in Davis, "Evidence Reform: The Administrative Process Leads the Way," 34 Minn. L. Rev. 581 (1950).

**Excerpts from the Benjamin Report—Rules of Evidence.**

[Commissioner Benjamin discussing the applicability of so-called exclusionary rules of evidence before administrative agencies, offered the following comments on the subject: <sup>17</sup>]

In considering the merits of the doctrine that the exclusionary rules of evidence are not legally binding on quasi-judicial hearings, it is unnecessary, in my view, to determine precisely how far the legal rules are a product of the jury system, designed to protect the jury against evidence that may be unreliable or prejudicial, and how far they are attributable to other historical causes. It is agreed that some of the exclusionary rules have been developed largely for the protection of the jury; and a more detailed answer to the historical question would not materially help to answer the question of present policy. At best the historical argument is inconclusive; it does not follow, because rules have been developed for one purpose, that they might not be useful for another.

My own conclusion, that the existing doctrine is sound, is based primarily on a number of other considerations, which exist in varying combinations in different types of quasi-judicial proceedings, but some of which exist in all; and to these I now turn.

The law of evidence as it now exists, however useful it may be in practical operation in the courts, is unsystematized, difficult to understand in detail, and difficult to apply. Its successful application requires trained and experienced judges; and even these are found by the appellate courts to have fallen into frequent error. Its successful application requires also trained and experienced counsel. The law of evidence as applied in judicial proceedings is not self-executing. Counsel must call the exclusionary rules into play and, no less important, must use judgment when not to call them into play. A vast amount of time would be lost, and to no good purpose, if in every litigation everything were required to be proved according to the strict rules of evidence; and an experienced lawyer knows that it is only the inexperienced who constantly invoke those rules on every point.

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<sup>17</sup> Taken from the Report on Administrative Adjudication in the State of New York (1942), prepared by Robert M. Benjamin, Commissioner, pp. 173-178.

It is a frequent characteristic of quasi-judicial proceedings that the hearing officer is not a trained lawyer; nor would mere legal training of hearing officers assure expertness in the field of evidence. It is another frequent characteristic of quasi-judicial proceedings that the parties are not represented by counsel. The essential conditions of the successful application of the rules of evidence are therefore lacking, in many instances. For those instances at least, administrative adjudication must be able (as in my judgment it is) to operate satisfactorily without a legal requirement that the exclusionary rules of evidence be applied.

But even where hearing officers have the necessary training and experience to apply the rules of evidence, and where the parties are represented by counsel, there are persuasive considerations against making the exclusionary rules legally binding.

As Dean Wigmore has said, most of the rules of evidence "are merely rules of caution, i.e. they are based upon a possibility of error; so that the failure to observe the rule is perfectly consistent with a high probability of truth." The exclusion (under a technical exclusionary rule as to competency) of logical probative evidence whose actual probative value could be appraised with reasonable accuracy by the tribunal, is far more likely to lead to the wrong result than the admission of such evidence would be. A trained hearing officer's experience, and his familiarity with the particular field of inquiry, should often enable him to appraise more accurately the weight properly to be accorded to such evidence than could a jury or even a judge unfamiliar with the field of litigation. The precautionary measures that are thought necessary in judicial proceedings would, in my judgment, often operate as an unwarranted hinderance to rational inquiry in a quasi-judicial proceeding.

There are other relevant differences between quasi-judicial and judicial proceedings. Quasi-judicial, more often than judicial, hearings are held at a distance from the scene of the events with which they are concerned; and this may make it difficult if not impossible to produce at the hearing the witnesses and documentary evidence that should ideally be produced. Quasi-judicial proceedings must often be brought on for hearing in a much shorter time than typically elapses between the institution of a judicial proceeding and the trial. For this reason and others (e. g., the volume of cases in a given agency, or the small amount involved in a particular case), there is often no advance preparation for the hearing, either on the part of the agency or on the part of the outside party, comparable to preparation for trial in private litigation, where there is greater opportunity to marshal in advance the best witnesses and the best documentary evidence. Thus it is frequently a matter of practical necessity to be satisfied in a quasi-judicial hearing with something less than the theoretically best evidence.

Evidence that would violate the technical exclusionary rules is, moreover, sometimes particularly appropriate in a quasi-judicial hearing. Thus on an application for a certificate of public convenience and necessity for an omnibus line, or on an application to discontinue part of a utility's services, or on an application for a restaurant liquor license in a rural community, it is often desirable to permit members of the public to express their views freely; and those views are likely to be expressed largely in terms of opinions and conclusions, and to include reference to views of others in the community, with whom the witness may perhaps be associated in some local organization. The weight to be accorded to such testimony can safely be left to the tribunal; the denial of an opportunity so to testify, within reasonable limits, would seem technical to the point of artificiality. Again, where a license revocation hearing is held as the result of an investigator's report of some alleged violation it will often be desirable (as is the usual practice in the State Liquor Authority) to begin the hearing by having the investigator read his report or testify to its substance. It should be helpful to the respondent and to the hearing officer to hear the report which led in the first instance to the institution of the proceeding, and no less helpful because an investigator's report is likely to contain matter that violates the hearsay rule and the best evidence rule. Again, where the issue is one which involves matters of expert scientific or other knowledge in the agency's particular field, the use of official reports or memoranda (beyond the scope of the "official statements" exception to the hearsay rule) or of the records of earlier proceedings or other matter in the agency's files, subject to an opportunity to controvert and perhaps to cross-examine, will often be desirable, and sometimes a practical necessity.

Application of the exclusionary rules to quasi-judicial hearings would, finally, contribute to delay. The time that would be spent in argument on the admission of evidence I consider of minor importance; perhaps in many instances it would not be much more than is now spent in such argument, even though the exclusionary rules are not binding. Conformity to technical methods of proof, which the exclusionary rules require, would in many instances be more burdensome, e.g., conformity to technical rules relating to the authentication of documents whose authenticity is not reasonably open to dispute, conformity to the rules governing hypothetical questions to expert witnesses, interruption of testimony to exclude statements of opinions and conclusions. Application of the exclusionary rules of proof by an agency of matters within the field of its own expert knowledge and experience would (as I have suggested at the end of the preceding paragraph) often cause much greater delay, sometimes to the point of defeating effective administrative action. Apart from delay in the quasi-judicial hearing itself, more-

over, there would be delay at the stage of judicial review. Obviously the exclusionary rules could not be made legally binding without making prejudicial violation of the rules ground for reversal on judicial review. This would open the prospect of a great increase in applications for judicial review on technical grounds, even in cases where it would ultimately be determined that no error, or no prejudicial error, in ruling on evidence had been committed,—a serious prospect, in view of the vast volume of administrative adjudication in the State.

### **Extent to Which Rules of Evidence Apply.**

It should not be thought that administrative agencies proceed in complete disregard of the exclusionary rules of evidence. In normal practice before the agencies, considerable attention is paid to these rules. Objection to the receipt of hearsay or otherwise incompetent or immaterial testimonial offers is frequently made. Hearing officers have power to invoke the exclusionary rules, and do so whenever in their judgment the circumstances so recommend.

The danger to counsel of not being prepared with legally competent evidence is illustrated by *National Labor Relations Board v. Fairchild Engine & Airplane Corp.* (CCA 4th, 1944), 145 F. (2d) 214, where respondent undertook to prove certain facts by a witness who testified to them from hearsay. The trial examiner ruled that in view of the circumstances of the case, and the critical importance of this particular factual issue, the hearsay would not be received. At the conclusion of the day's hearing, late in the afternoon, respondent offered to produce on the following day a witness who could testify to the facts in question from personal knowledge. The trial examiner refused to continue the hearing to permit this to be done; and the record was closed without this evidence; and the Board made a finding against respondent. While the court of appeals did not approve the course followed, neither did it grant respondent any relief.

Practicing attorneys report that the proof-taking processes of administrative agencies are not vastly different from those of judges in non-jury cases. The fundamental principles of relevancy, materiality and probative force are applied in a manner not unlike that of equity courts, or federal judges in nonjury cases.

In some respects, the rules of evidence quite definitely apply. Thus, agencies have been required to recognize the privileges which the law attaches to communications to priests, attorneys, physicians, and other confidential disclosures. *Baldwin v. Commissioner of Internal Revenue* (CCA 9th, 1942), 125 F. (2d) 812; *New York City Council v. Goldwater*, 284 N. Y. 296, 31 N. E. (2d) 31 (1940). The admission of hearsay under such circumstances as to infringe substantially the right of cross-examination may amount to a denial of a fair hearing. *Powhatan Mining Co. v. Ickes* (CCA 6th, 1941), 118 F. (2d) 105; *Tri-State*

Broadcasting Co., Inc. v. Federal Communications Commission (App. D. C. 1938), 96 F. (2d) 564; United States v. Baltimore & O. S. W. R. Co., 226 U. S. 14, 57 L. Ed. 104, 33 S. Ct. 5 (1912). Reception of evidence which is not only without probative force but is prejudicial in effect is similarly sometimes made a basis for invalidating an administrative determination. *Bridges v. Wixon*, 326 U. S. 135, 89 L. Ed. 2103, 65 S. Ct. 1443 (1945); *People ex rel. Moynihan v. Greene*, 179 N. Y. 253, 72 N. E. 99 (1904). As one court put it, the power given administrative agencies to receive incompetent evidence is conditioned on the premise that it must be done fairly. *John Bene & Sons, Inc. v. Federal Trade Commission* (CCA 2nd, 1924), 299 Fed. 468, 471. Many agencies, by rule, provide codes of evidence to be followed by their hearing examiners.

**Recommendation of Hoover Commission Task Force on Legal Services and Procedure, 1955 (Report, p. 199).**

**RECOMMENDATION NO. 47**

*In adjudication required under the Constitution or by statute to be made after hearing, the rules of evidence and requirements of proof should apply, to the extent practicable, as in civil nonjury cases in the United States district courts, and parties should be afforded an opportunity to controvert facts officially noticed by agencies prior to entry of a final decision.*

**The Problem**

A serious deficiency in the administrative adjudicatory process is the absence of any uniform method of evaluating evidence and proof. The relative informality of some agency proceedings was thought to be an advantage of the administrative method. But experience has demonstrated that, without sound rules governing the admissibility of evidence and the establishment of proofs, agency proceedings can become involved and cumbersome, with consequent delay in the making of decisions and difficulty in the judicial review of administrative action.

Some agency procedures are already governed by the rules of evidence applicable in the district courts under the Rules of Civil Procedure for the United States District Courts, e.g., the National Labor Relations Board under 29 U.S.C. § 160 (b) (1952). This has resulted in marked improvement in the quality of the records, more expeditious handling of cases within the agency, and more adequate judicial review.

An important reason why it has not been possible, in the past, to require all agencies to comply with judicial evidentiary principles and methods of proof is that hearings frequently were conducted by hearing officers who were not trained in the law. The absence of qualified hearing examiners and enforceable standards of admissibility of evidence, led to leniency on the part of the hearing officers in admitting irrelevant and immaterial evidence, see the Report of the Advisory Committee on Administrative Procedure of the Judicial Conference of the United States 5 (1951), and the First Report of the President's Conference on Administrative Procedure 17 (1954).

The task force has recommended that, in the future, the primary responsibility for conducting administrative adjudications should be placed upon a corps of hearing commissioners whose responsibility

in the administrative process shall be that of administrative judges. Hearings commissioners, trained in the law, and skilled in the techniques of proof and the evaluation of evidence, will be competent to rule upon objections to the admissibility of evidence, to retain that which is material and competent, and to exclude that which is irrelevant or unreliable. Since they will be performing a function analogous to that of a trial judge, it is appropriate that the standards they use be substantially the same as applied by judges in nonjury civil cases in the United States district courts.

The task force recommends that the Administrative Procedure Act be amended to require that in formal adjudication the rules of evidence and requirements of proof shall apply, to the extent practicable, as in civil nonjury cases in the United States district courts. In effect, this would require all agencies to follow rule 43 of the Rules of Civil Procedure for the United States district courts.

### **What Evidence Is Required to Support Finding**

#### **Legal Residuum Rule.**

**Matter of Carroll v. Knickerbocker Ice Co., Court of Appeals of New York, 1916. 218 N. Y. 435, 113 N. E. 507.**

[Appeal from the decision of the Supreme Court, Appellate Division, Third Department, affirming an order of the Workmen's Compensation Division.]

CUDDEBACK, J. This is an appeal by the Knickerbocker Ice Company from an order affirming the decision and award of the Workmen's Compensation Commission in the matter of the claim of Bridget Carroll for compensation for the death of her husband, Myles Carroll, which was occasioned, as it is alleged, by injuries received while he was in the employ of the appellant. The Knickerbocker Ice Company is a self-insurer under the Workmen's Compensation Law. The decedent was employed by the ice company as driver on an ice wagon, and the claim is that he suffered an injury on September 22, 1914, while delivering ice. The Commission made certain findings of fact upon which it based an award to the claimant. One of such findings of fact is as follows:

"(2) On said date while said Carroll was putting ice in the cellar of a saloon at 20 East Forty-Second street, borough of Manhattan, city of New York, the ice tongs slipped and a 300-pound cake of ice fell upon him, striking him in the abdomen, causing an epigastric hemorrhage and a rigidity of the abdomen. He was taken to a hospital, and there developed delirium tremens, and died on the 28th day of September, 1914."

Section 21 of the Workmen's Compensation Law (L. 1914, c. 41) provides that in any proceeding upon a claim for compensation under the law, "it shall be presumed in the absence of substantial evidence to the contrary (1) that the claim comes within the provisions of this chapter," etc. There was in this case substantial evidence to overcome this



statutory presumption. A helper on the ice wagon and two cooks employed in the saloon where the ice was delivered testified before the Commission that they were present at the time and place when it was alleged the plaintiff was injured, and that they did not see any accident whatsoever happen to him, and that they did not see any cake of ice fall. The physicians who subsequently examined the decedent testified that there were no bruises, discolorations, or abrasions on the surface of his body.

The finding of the Commission is based solely on the testimony of witnesses who related what Carroll told them as to how he was injured. Carroll's wife testified that when he came home from his work he told her that he was putting a 300-pound cake of ice in Daley's cellar and the tongs slipped and the ice came back on him. The physician who was called to treat the injured man at his home, a neighbor who dropped in, and the physicians at the hospital, where he was taken later in the day, testified that he made like statements to them.

The question is presented whether this hearsay testimony is sufficient, under the circumstances of the case, to sustain the findings of the Commission. The decision of the Appellate Division which affirmed the ~~and~~ was not unanimous, and therefore there is open in this court the question whether there was any evidence to sustain the finding.

It is a question with textbook writers whether the rules of evidence which exclude hearsay testimony are wise and well founded or not. It is argued by some that though such testimony is not supported by an oath, and is not subject to the test of cross-examination, it is nevertheless valuable. There are some jurisdictions in which it has been held that hearsay testimony is admissible (*Insurance Co. v. Mosley*, 75 U. S. [8 Wall.] 397), but the contrary has always been the rule of the courts in this state, which have steadfastly resisted any innovation in the rule. *Waldele v. N. Y. C. & H. R. R. Co.*, 95 N. Y. 274. But we are not concerned here with any abstract question as to the wisdom or lack of wisdom in the law which excludes hearsay testimony.

We have only to consider whether the law of this state excluding such testimony has been changed in cases coming within the Workmen's Compensation Law by section 68 of that law. That section is as follows:

"Sec. 68. Technical Rules of Evidence or Procedure Not Required. The Commission or a commissioner or deputy commissioner in making an investigation or inquiry or conducting a hearing shall not be bound by common law or statutory rules of evidence or by technical or formal rules of procedure, except as provided by this chapter; but may make such investigation or inquiry or conduct such hearing in such manner as to ascertain the substantial rights of the parties."

This section has plainly changed the rule of evidence in all cases affected by the act. It gives the Workmen's Compensation Commission free reign in making its investigations and in conducting its hearings,

and authorizes it to receive and consider, not only hearsay testimony, but any kind of evidence that may throw light on a claim pending before it. The award of the Commission cannot be overturned on account of any alleged error in receiving evidence.

This is all true, but as I read it, section 68, as applied to this case, does not make the hearsay testimony offered by the claimant sufficient ground to uphold the award which the Commission made. That section does not declare the probative force of any evidence, but it does declare that the aim and end of the investigation by the Commission shall be "to ascertain the substantial rights of the parties." No matter what latitude the Commission may give to its inquiry, it must result in a determination of the substantial rights of the parties. Otherwise the statute becomes grossly unjust and a means of oppression.

The act may be taken to mean that while the Commission's inquiry is not limited by the common law or statutory rules of evidence or by technical or formal rules of procedure, and it may, in its discretion, accept any evidence that is offered, still in the end there must be a residuum of legal evidence to support the claim before an award can be made. As was said by JUSTICE WOODWARD in his able dissenting opinion at the Appellate Division:

"There must be in the record some evidence of a sound, competent, and recognizedly probative character to sustain the findings and award made, else the findings and award must in fairness be set aside by (the) court."

It is not necessary to consider in this case the constitutional limitations upon the power of the Legislature to change the rules of evidence. It is sufficient to say that the intention of the Legislature as revealed in the Workmen's Compensation Law was not so revolutionary in character as to declare that an award can be sustained which is dependent altogether on hearsay testimony, where the presumption created by section 21 of the statute is overcome by substantial evidence.

The only substantial evidence before the Workmen's Compensation Commission was to the effect that no cake of ice slipped and struck the decedent, and there were no bruises or marks upon his body which indicated that he had been so injured. The findings to the contrary rest solely on the decedent's statement made at a time when he was confessedly in a highly nervous state, which ended in his death from delirium tremens. Such hearsay testimony is no evidence. *Matter of Case*, 214 N. Y. 199.

It is suggested that the hearsay testimony was admissible as part of the *res gestae*; but, according to the rules of the courts of this state, the statements of the injured man in this case were not part of the *res gestae*; but were simply narratives of an event past and gone. *Greener v. General Electric Co.*, 209 N. Y. 135.

Since this appeal was taken the Workmen's Compensation Commission has been superseded by the Industrial Commission, but that change does not affect any of the questions that have been considered.

I recommend that the order appealed from be reversed, and the claim for compensation be dismissed, with costs against state Industrial Commission and that the question certified to this court be answered in the negative.

POUND, J. (dissenting). I think this case should not be disposed of by deciding that all evidence held to be objectionable as hearsay in the courts of this state is without probative force. Our law of evidence is largely a product of the jury system. The purpose of its exclusionary rules is to keep from the jury, not only all that is irrelevant, but also much that, although relevant, is remote, or collateral, or nonprobative, and, therefore, tends to mislead or confuse. I assume that the Industrial Commission, although not "bound by common law or statutory rules of evidence" (W. C. L. § 68) must, in exercising its functions, for the sake of system and simplicity, apply certain principles of the law of evidence based on experience as well as authority, the chief being that witnesses should, as far as practicable, testify from their own knowledge of relevant facts, orally, publicly, under oath or affirmation and subject to the test of cross-examination. Yet we cannot overlook the obvious fact that "the changing experience of mankind" may dictate that these fundamental principles be modified and liberalized in their application, when the hearing is before tribunals which adjudicate both on law and fact, and not before a jury summoned temporarily from the vicinage and untrained in the discriminating art of deciding causes on evidence. The ascertainment of truth rather than the integrity of the rules being the foremost consideration, we find that when the jury is absent the rules are less strictly enforced; it being assumed that the court will not be easily confused or misled by that which is irrelevant and inconclusive.

Hearsay is said by the old writers to be "of no value in a court of justice" (Bull. N. P. 294), and "no evidence" (Gilbert on Evidence [2d Ed.] 152), yet the rule against hearsay, even at common law, is subject to many exceptions, and is not inelastic either in statement or application. Thayer in his luminous and philosophic Preliminary Treatise on Evidence at the Common Law (pages 522, 523) suggests that:

"A true analysis would probably restate the law so as to make what we call the rule the exception, and make our main rule this, namely, that whatsoever is relevant is admissible. . . . No doubt, in point of reason, hearsay statements often derive much credit from the circumstances under which they are made, say, for example, from the fact of being made under oath, or under impressive conditions as being against interest, or made under strong inducements to say the contrary;

or as part of a series of statements or a class of them which are usually careful and accurate, and the like; credit amply enough in point of reason to entitle them to be received in evidence, when once the absence of the perceiving witness is accounted for, and it would in reason have been quite possible to shape our law in the form that hearsay was admissible as secondary evidence, whenever the circumstances of the case were alone enough to entitle it to credit, irrespective of any credit reposed in the speaker."

The rule and its exceptions are not always and everywhere the same. The decisions are not in harmony. What is admissible in one jurisdiction is sometimes excluded in another. In the same jurisdiction the exception as first formulated is sometimes limited or extended by later cases. In *Insurance Co. v. Mosley*, 8 Wall. 397, the question was whether the assured died from the effects of an accidental fall down stairs in the night or from natural causes. Assured had left his bed between 12 and 1 o'clock at night and it was held that his declarations to his wife when he came back that he had fallen down the back stairs and hurt himself badly were competent and sufficient proof of the fall because they were made so soon thereafter as to be in the nature of *res gestae*—declarations contemporaneous with the main fact and part thereof. The evidence was, nonetheless, the narrative by a person since deceased of a past, although a recent, event. This court in *Waldele v. N. Y. C. & H. R. R. Co.*, 95 N. Y. 274, 278, therefore, very properly characterized the Mosely case as "an extreme case," and in *Greener v. General Electric Co.*, 209 N. Y. 135, 138, said:

"The distinction to be made (in such cases) is in the character of the declaration; whether it be so spontaneous, or natural, an utterance as to exclude the idea of fabrication; or whether it be in the nature of a narrative of what had occurred."

The force of this rule lies somewhat in the application of it. *People v. Del Vermo*, 192 N. Y. 470, 483, and cases cited. Can we say that evidence which the Supreme Court of the United States held competent and sufficient, i. e., the declarations of a deceased person made soon after the alleged accidental injury and under circumstances entitling them to credit, is not competent and sufficient proof before the Industrial Commission under the rule of section 68 of the Workmen's Compensation Law which says that the Commission shall not be bound by common-law rules of evidence? May not the Commission, under this statute, adopt the rule of the Supreme Court of the United States and in its discretion give it an extremely liberal application and reject the stricter rule laid down by this court without being open to the charge of making an award on no evidence whatever? Could not "the substantial rights of the parties" be thereby ascertained? If it may go so far, we need only hold that where the common-law rule against hearsay is not uniformly stated or applied, the Commission

may base an award upon evidence received under the exceptions to the rule most favorable to the claimant, without being bound by the decisions of this court thereon. I think that the evidence of Carroll's declarations to his wife when he came home from work and to the physician called to treat him might, without too violent a wrench to our established ideas, be held competent under the exception to the rule against hearsay applied to the Mosley case. In any event as pointed out by my BROTHER SEABURY in his opinion the evidence was legal and admissible. If it had any probative force, its weight was for the Commission as triers of fact, and their decision thereon was final. Workmen's Compensation Law, § 20. I think that we cannot say as matter of law that it had no probative force under section 68 of the act, but I do not thereby conclude that all hearsay has probative force, or that awards in contested cases may be allowed or disallowed on rumor or report to which the circumstances give no weight. It is not to be anticipated that the Commission will become confused, waste time, lose sight of the main issue, and base awards or refuse them on haphazard hearsay, as our convention is that a jury might if it were permitted to hear everything relevant.

I vote for affirmance.

HISCOCK, COLLIN and HOGAN, JJ., concur with CUDDEBACK, J., and WILLARD BARTLETT, C. J., concurs in result in memorandum. SEABURY and POUND, JJ., read dissenting opinions, each of whom concurs in the opinion of the other.

Order reversed, etc.

**National Labor Relations Board v. Remington Rand, Inc., United States Circuit Court of Appeals, Second Circuit, 1938. 94 F. (2d) 862.**

L. HAND, Circuit Judge. This case arises upon a petition filed by the National Labor Relations Board under section 10 (e) of the National Labor Relations Act, 29 USCA par. 160 (e), for an order of this court to enforce the Board's order, passed on March 13th, 1937, in a proceeding before it against the respondent, Remington Rand, Inc. This was begun upon a charge, filed with the Board by the Remington Rand Joint Protective Board of the District Council Office Equipment Workers, on which the Board filed a complaint alleging that the respondent was engaging in "unfair labor practices." The respondent answered, and a trial examiner was appointed who conducted hearings during November and December, 1936. The respondent appeared at these hearings, cross-examined the witnesses, but put in no evidence of its own except a few exhibits. The decision on which the order was issued is extremely voluminous, covering more than 200 pages of the printed record; it is rather in the nature of a discursive opinion than of specific findings of fact, but it ends with certain conclusions of law followed by the order, a copy of which is annexed at the end hereof. . . .

[The court thereupon proceeded to consider the Board's order in detail, sustaining it in general, but directing modifications of certain specified features. The most significant paragraph in the lengthy opinion deals with the Company's exceptions to the trial before the examiner and to the rules of evidence applied therein. It follows:]

Finally, the respondent complains that the examiner did not give it a fair trial; and the intervenor that it had no notice of the proceedings, though its interests were deeply concerned. As to the first, the charges are that the examiner cut short cross-examination; himself took an undue part in the examination; refused a bill of particulars; admitted incompetent, and excluded competent, evidence; used exhibits which had not been admitted in evidence; and in other ways treated it unfairly. We have examined all the instances mentioned in the brief and cannot find anything of consequence. Once or twice cross-examination was stopped, but not, as it seems to us unduly soon. The examiner was quite within his powers in examining the witnesses himself; a judge often does so. He did indeed admit much that would have been excluded at common law, but the act specifically so provides, section 10 (b), 29 USCA par. 160 (b);<sup>18</sup> no doubt, that does not mean that mere rumor will serve to "support" a finding, but hearsay may do so, at least if more is not conveniently available, and if in the end the finding is supported by the kind of evidence on which responsible persons are accustomed to rely in serious affairs. The examiner did deny a bill of particular, but that could not have seriously prejudiced the respondent. Such a bill is important only when a party must meet his adversary's case without opportunity to prepare; it is of slight value in a trial by hearings at intervals. The notion that its absence really handicapped the respondent in its cross-examination seems to us illusory; and it needed no time to prepare a case for it chose not to put in any. The exhibit admitted after the hearing was closed, was only an abstract of papers presented at the trial of which the respondent had the originals. So far as the conduct of the trial is concerned we cannot, therefore, see any just grievance. The underlying tone and the style of the decision may not indeed have evinced that judicial detachment which is the surest guarantee of even justice; but the respondent does not apparently complain of that, and our review does not extend to controverted questions of fact.

#### **Appraisal of Rule.**

In applying the rule that administrative findings of fact shall be conclusive if supported by substantial evidence (a rule which by statute

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<sup>18</sup> Section 10 (b) of the National Labor Relations Act provides with regard to Board hearings "In any such proceeding the rules of evidence prevailing in courts of law or equity shall not be controlling."

has been made applicable, in many slightly variant forms, to the great majority of federal and state agencies), the initial question to be decided is whether the evidence received and believed by the agency can be deemed to be "substantial," even though none of it would have been received under the exclusionary rules of evidence followed by courts in jury cases.

On this question, the courts are not agreed. Many state courts still agree with the 1916 observation of the New York Court of Appeals in *Matter of Carroll*, *supra* [which the same court reaffirmed (possibly with some qualifications) in *Altschuller v. Bressler*, 289 N. Y. 463, 46 N. E. (2d) 886 (1943)], that while an agency "may, in its discretion, accept any evidence that is offered, still in the end there must be a residuum of legal evidence to support the claim." A number of the federal courts also adhere to this view; but others (joined by some state courts) agree with the statement in *Remington Rand*, *supra*, that while "mere rumor" will not serve to support a finding, "hearsay may do so, at least if more is not conveniently available, and if in the end the finding is supported by the kind of evidence on which responsible persons are accustomed to rely in serious affairs."

Typical cases upholding the legal residuum rule would include: *National Labor Relations Board v. Bell Oil & Gas Co.* (CCA 5th, 1938), 98 F. (2d) 870—a statutory provision relaxing rules of evidence means that it is not error for the agency to "hear incompetent evidence. It does not mean that a finding of fact may rest solely on such evidence." *National Labor Relations Board v. Illinois Tool Works* (CCA 7th, 1941), 119 F. (2d) 356, where it was said that the relaxation of the strict rules of evidence "was done for the sole purpose of expediting administrative procedure, and not to limit in any manner the well-known rules relating to the weight or the applicability, or the materiality of the evidence."

Illustrative of decisions rejecting the legal residuum rule are *National Labor Relations Board v. Service Wood Heel Co., Inc.* (CCA 1st, 1941) 124 F. (2d) 470, in which the court said that an administrative agency may utilize, as the basis for findings of fact, evidence which would not be admissible in court, if the evidence is such as would normally be relied on by reasonable people; *International Ass'n of Machinists, Tool & Die Makers Lodge No. 35 v. National Labor Relations Board* (App. D. C. 1939), 110 F. (2d) 29, where the court declared that "it is only convincing, not lawyers' evidence which is required."

It is perhaps significant that the four cited cases all involve decisions of the National Labor Relations Board. Between 1937 and 1947, that agency was continuously engaged in litigation involving the substantiality of the evidence on which it had relied. The practices of the Board in receiving evidence were the subject of considerable criticism, both

judicial and nonjudicial; and in adopting the Labor-Management Relations Act, 1947, 61 Stat. 136, 29 USC 141, Congress imposed upon the Board the duty of following, so far as practicable, the rules of evidence in the federal district courts. Since this enactment, the Board itself has taken the position that findings should not be based on uncorroborated hearsay: *Ohio Associated Telephone Co.*, 91 N. L. R. B. 932 (1950). Likewise, the federal courts have interpreted the amended act as meaning that as a general rule the agency's findings may not validly be based entirely on hearsay or other incompetent evidence. *Willapoint Oysters, Inc. v. Ewing* (CA 9th, 1949), 174 F. (2d) 676; *Superior Engraving Co. v. National Labor Relations Board* (CA 7th, 1950), 183 F. (2d) 783; *National Labor Relations Board v. Haddock-Engineers, Ltd.* (CA 9th, 1954), 215 F. (2d) 734; cf. the views expressed in *American Rubber Products Corp. v. National Labor Relations Board* (CA 7th, 1954), 214 F. (2d) 47, where nothing was offered to contradict the hearsay evidence on which the agency relied.

It should be borne in mind that those courts which have rejected the legal residuum rule do not hold that hearsay or other legally incompetent evidence may always be deemed "substantial," so as to support an agency finding. For example, if hearsay is substituted for more convincing evidence that is available, the hearsay might well be deemed to be less than "substantial." See, e. g., *Martel Mills Corp. v. National Labor Relations Board* (CCA 4th, 1940), 114 F. (2d) 624. The courts which reject the legal residuum rule do not say that any incompetent evidence is enough; it is deemed sufficient only if it is of the type on which the judges believe reasonable men would rely in deciding an important question.

What do you think of the legal residuum rule? It has been widely criticized. It is charged, for example, that the mere circumstance that there is some residuum of proof pointing in one direction or another has nothing to do with the making of the administrative finding, because the agency is influenced by the preponderance of the testimony, not the residuum thereof. As observed by Wigmore, "it is obviously fallacious to assume that one or more pieces of 'legal' evidence are 'per se' a sufficient guarantee of truth." 1 Wigmore on Evidence, 3d Ed. (1940) 41. The rule, in short, is branded as artificial. On the other hand, it is urged that the existence of the rule has accomplished considerable good, because the fear that it may be invoked has led agencies to insist on careful presentation and detailed examination of the evidence offered in contested cases.

In most cases, to be sure, it makes no difference whether the court accepts or rejects the legal residuum rule, because there is more than a residuum of legally competent evidence pointing both ways; the agency decision would be supported by at least a residuum of legally competent evidence, whichever way it decided the case. This brings us



to the really difficult problems involved in determining the "substantiality" of evidence—problems more fully disclosed in the next group of cases.

### Substantial Evidence.

**Opp Cotton Mills, Inc. v. Administrator of Wage and Hour Division of Department of Labor, United States Supreme Court, 1941. 312 U. S. 126, 85 L. Ed. 624, 61 S. Ct. 524.**

MR. JUSTICE STONE delivered the opinion of the court.

Three types of questions are presented by the petition for certiorari in this case: . . .

THIRD, whether the order of the Administrator is invalid because his findings on which the order is based are without the support of substantial evidence. The challenged findings are that the minimum wage established by the order will not substantially curtail employment, and that a classification within the industry is unnecessary for the purpose of fixing, for each classification within it, the highest minimum wage which will not substantially curtail employment in such classification and will not give any competitive advantage to any group in the industry.

Petitioner, Opp Cotton Mills, Inc. an Alabama corporation subject to the Fair Labor Standards Act, alleging that it was aggrieved by an order of respondent, the Administrator, brought the present proceeding in the Circuit Court of Appeals for the Fifth Circuit pursuant to § 10 of the Act, to review and set aside the order fixing a uniform 32½ cents per hour minimum wage for the textile industry and for other relief. So far as now relevant petitioners challenged the validity of the Act and the order upon the grounds already mentioned. The Court of Appeals sustained the order. 5 Cir., 111 F. 2d 23. We granted certiorari, October 14, 1940, on a petition raising the same questions concerning the validity of the order which we deem of public importance in the administration of the Act. 311 U. S. 631, 61 S. Ct. 46, 85 L. Ed. 402.

We are here concerned with § 5 (a), § 6 (a) (4), and § 8, under which the proceedings were had which resulted in the challenged order of the Administrator. These sections read together set up an administrative procedure for establishing a minimum wage in particular industries greater than the statutory minimum prescribed by § 6, but not in excess of 40 cents an hour, such increase over the statutory minimum to be fixed for any industry subject to the Act by the Administrator in collaboration with an industry committee.

Section 5 provides, subsection (a), that the Administrator shall appoint an industry committee for each industry engaged in interstate commerce or in the production of goods for the commerce; that, subsection (b), the committee shall include persons representing the public,

one of whom shall be designated as chairman, a like number representing employees in the industry, a like number representing employers in the industry, and directs that "In the appointment of the persons representing each group, the Administrator shall give due regard to the geographical regions in which the industry is carried on"; that, subsection (d), the Administrator shall submit to the committee from time to time available data on matters referred to it, shall cause to be brought before the committee in connection with such matters any witnesses whom he deems material, and that the committee may summon other witnesses or call upon the Administrator to furnish additional information to aid it in its deliberations.

Section 6 (a) (4) provides that at any time after the effective date of the section the minimum wage shall be "not less than the rate (not in excess of 40 cents an hour) prescribed in the applicable order of the Administrator issued under section 8 [208]." Section 8 (a) prescribes the procedure to be followed by the Administrator and industry committee in establishing the minimum wage authorized by § 6 (a) (4). It provides that with the view to carrying out the policy of the Act "by reaching, as rapidly as is economically feasible without substantially curtailing employment, the objective of a universal minimum wage of 40 cents an hour in each industry" subject to the Act, the Administrator "shall from time to time convene the industry committee for each such industry" which "shall . . . recommend the minimum rate or rates of wages to be paid under section 6 [206] by employers" subject to the Act "in such industry or classifications therein."

Upon the Administrator's referring to the committee the question of minimum wage rates in our industry, § 8 (b) requires it to "investigate conditions in the industry", authorizes it or a sub-committee to "hear such witnesses and receive such evidence as may be necessary or appropriate to enable the committee to perform its duties and functions" under the Act and requires the committee to "recommend to the Administrator the highest minimum wage rates for the industry which it determines, having due regard to economic and competitive conditions, will not substantially curtail employment in the industry." Subsection (c) requires the committee for any industry to "recommend such reasonable classifications within any industry as it determines to be necessary for the purpose of fixing for each classification within such industry the highest minimum wage rate (not in excess of 40 cents an hour) which (1) will not substantially curtail employment in such classification and (2) will not give a competitive advantage to any group in the industry, and shall recommend for each classification in the industry the highest minimum wage rate which the committee determines will not substantially curtail employment in such classification." It further directs that "no classification shall be made, and no minimum wage rate shall be fixed, solely on a regional basis, but the industry committee

and the Administrator shall consider among other relevant factors the following:

"(1) competitive conditions as affected by transportation, living, and production costs;

"(2) the wages established for work of like or comparable character by collective labor agreements negotiated between employers and employees by representatives of their own choosing; and

"(3) the wages paid for work of like or comparable character by employers who voluntarily maintain minimum-wage standards in the industry."

By § 8 (d) after the industry committee files its report with the Administrator he, "after due notice to interested persons, and giving them an opportunity to be heard, shall by order approve and carry into effect the recommendations contained in such report, if he finds that the recommendations are made in accordance with law, are supported by the evidence adduced at the hearing, and, taking into consideration the same factors as are required to be considered by the industry committee, will carry out the purposes of this section." Otherwise the Administrator is required to disapprove the recommendations of the committee and again refer the matter to the committee or to another committee for the industry which he may appoint for that purpose. Subsection (f) provides among other things that the wage orders of the Administrator "shall define the industries and classifications therein to which they are to apply" and subsection (g) provides that "due notice of any hearing provided for in the section shall be given by publication in the Federal Register and by such other means as the administrator deems reasonably calculated to give general notice to interested persons."

As appears from his findings in support of the order, the Administrator, on September 13, 1938, appointed Industry Committee No. 1 for the textile industry, that industry being so defined by the order of appointment as to include the manufacture of cotton, silk, rayon and other products. Seven persons representing the public, seven representing employers in the industry, and seven representing employees were appointed to the Committee. Upon request of the Administrator at the Committee's first meeting in October, 1938, subcommittees were appointed for the purpose of considering precisely where the line should be drawn between the textile and some related industries not included in the definition adopted. Before the Committee concluded its deliberations on the recommended wage order the Administrator modified the definition in certain respects not now material.

At a meeting in December, 1938, the Committee heard witnesses and received briefs and memoranda from numerous interested parties. Statistical and economic studies by the Bureau of Labor Statistics in the Economic Section of the Wage and Hour Division had been previously submitted. The Committee then designated another subcommittee to

gather additional information and hear such testimony as it deemed necessary to enable the Committee to arrive at a wage recommendation. This subcommittee obtained further economic data and heard additional witnesses including representatives of the American Association of Cotton Manufacturers of which petitioner is a member.

On March 21, 1939, after extended discussion and deliberation, the Committee, by a vote of thirteen to six, adopted a resolution which fixed tentatively a minimum wage of 32½ cents an hour amounting to \$13 per forty-hour week or \$676 for 52 weeks, as the rate to be recommended to the Administrator. At this meeting the Committee rejected proposals to establish classifications in the industry and wage differentials among the classes. A subcommittee was appointed to draft a report, and on May 22nd and 23rd, after the Administrator had again modified the definition of the industry, the Committee again approved by the same vote as before the 32½ cents minimum wage. The report was accepted and signed, the minority filing two reports in opposition to the recommendation. The report detailed the proceedings of the Committee, analyzed the evidence and data upon which the Committee relied in making its recommendation, gave special consideration to the question whether the wage fixed would curtail employment in the industry generally and in the southern cotton mills in particular, and to the problem of classification. It concluded that "no reasonably efficient enterprise in the textile industry need fear the result of the modest wage standard recommended for the industry," and that the data before it "did not warrant any regional" or other "classification."

On May 27th the Administrator gave notice in the Federal Register which was also issued to the press and published in many newspapers, of a public hearing on the recommendations of the Committee. At the hearing which commenced on June 19, 1939, and was concluded on July 11th, more than 135 witnesses were heard, over 3,300 pages of testimony were taken and eight volumes of exhibits were submitted; oral arguments were heard by the Administrator on July 25th and written briefs were received until August 22, 1939. On September 29, 1939, the Administrator made his findings and order carrying into effect the recommendations of the Committee, effective October 24, 1939, the date on which pursuant to § 6 (a) (2) a minimum wage of 30 cents per hour for all employees subject to the Act became effective.

The industry, as defined by the order, includes broadly the manufacture of yarns and fabrics of cotton and competing material such as rayon and silk, and of those finished products such as sheets, towels and napkins which are normally manufactured in the fabric weaving mills. The Administrator found that the basic considerations in determining which manufacturing processes were to be included within the definition were competitive interrelationships, convertibility of looms and the operations normally carried on by textile mills.

Although the Administrator was of opinion that the question of the composition of the Industry Committee was not properly before him for determination, he reviewed the evidence and concluded that the members had been chosen with due regard to the geographical regions in which the industry is carried on and that the Committee had considered the factors set forth in § 8 of the Act and had reached its recommendation in accordance with law.

The Administrator found that the 32½ cent minimum wage would increase the average wage bill for the textile industry as a whole 4 per cent over the 25 cent minimum in effect before October 24, 1939, and 2.1 per cent over the 30 cent minimum in effect thereafter and that the wage increases in the southern portion of the industry would be 6.25 per cent and 2.15 per cent over the 25 and 30 cent minimum respectively. He further found that since the average labor costs do not constitute over 36 per cent of production costs the minimum wage increase would increase production costs slightly over one-third of the percentages of wage increases just indicated, and that the increase in production costs would not result in such a rise in prices to ultimate consumers of the finished product as to decrease consumer demand.

From all this he drew the conclusion that there would be no substantial curtailment of employment in the industry as a whole or in its southern branch as a result of the increased wage. In the case of small cotton mills in the south employing only 7 per cent of the southern cotton textile workers (5 per cent of all in the entire cotton industry), paying the lowest wages, he concluded that the new minimum rate as contrasted with the 30 cent statutory rate would raise manufacturing costs more than the 1.94 per cent average, and for these mills the increase would range from 2.77 per cent to 3.75 per cent. The Administrator found that curtailment of employment even in the mills paying the lowest wages would be dependent on total cost and the technological and general efficiency of each mill, and that low wages do not necessarily coincide with a low degree of efficiency. The Administrator found generally that the small southern mills are not necessarily marginal or the least profitable and that, accepting the figures submitted by the group of small mills opposing the 32½ cent minimum, the increase in labor costs for such mills would be 13.5% and only 4 per cent in total manufacturing cost over the 25 cent minimum. The increase over the 30 cent minimum would be slightly over one-third of these percentages. The Administrator also found that a modernization program in these mills would displace only a small number of employees. From these and other facts detailed in the findings, the Administrator concluded that there would be no substantial curtailment of employment even in the group of small mills.

The Administrator also considered the factors for determining whether classification should be made for wage differentials within the indus-

try. After examining numerous studies of living costs made by the Bureau of Labor Statistics of the Department of Labor he concluded that the costs of living in the north exceed that in the south by about 4.6% on the average, and that the differences in costs between cities in each region greatly exceed the difference between the two regions as a whole. He accordingly concluded that living costs do not vary substantially or uniformly between regions and do not affect competitive conditions in the industry. He found that northern mills had an advantage with respect to transportation costs in shipping to the New England states, but southern mills had an advantage in shipping to the middle west and south, having a great population; that many northern finishing mills receive unfinished cloth from southern factories and thus bear the disadvantage in freight rates from the south to northern finishing mills and that on an average the south has a slight transportation advantage with respect to cotton coming to the mills there. He concluded that even with the average freight rates in the south somewhat higher than the north, on the whole the advantages and disadvantages in transportation costs in the two regions were approximately in balance and that any remaining disadvantage was so small as not to affect competitive conditions appreciably.

After considering the proportion of obsolescent machinery in northern and southern mills, their taxes, efficiency of workers, power and construction costs and profits, the Administrator found that the southern mills were at least in a position of equality with northern mills in so far as these factors affect production costs, and that after the establishment of the 32½ cent minimum the prevailing minimum wages in the north would be considerably higher than in the south. He concluded that neither wage rates in collective labor agreements nor wages paid by employers maintaining voluntary minimum wage standards required a classification within the industry, and finally he concluded that the Industry Committee's recommendations "are made in accordance with law, are supported by the evidence adduced at the hearing, and taking into consideration the same factors as are required to be considered by the Industry Committee, the prescribed 32½ cent wage will carry out the purposes of § 8 of the Act. . . ."

Petitioner makes a great variety of criticisms of the proceedings before the committee, all of which rest on the presupposition that either the statute or the demand of due process of law requires the Committee to hold hearings upon notice to interested persons and that its hearings be subject to review before the Administrator and finally as a part of the proceedings before the Administrator to judicial review on petition to the Circuit Court of Appeals, as provided by § 10.

Section 5 (c) directs that the Administrator shall "by rules and regulations prescribe the procedure to be followed by the committee." Section 5 (d), as already noted, provides that the Administrator shall sub-

to be brought before it, and that the committee "may summon other witnesses" to aid in its deliberations. Section 8 (b) requires the industry committee to "investigate" conditions in the industry. It provides that the committee "may hear such witnesses and receive such evidence as may be necessary or appropriate" and requires the committee to "recommend" to the Administrator "the highest minimum wage rates . . . which it determines, having due regard to economic and competitive conditions, will not substantially curtail employment in the industry." After the report is filed with the Administrator, he, upon due notice and hearing, is required to approve or reject the recommendations.

It is clear that the sections of the statute now before us do not require the committee to conduct a quasi-judicial proceeding upon notice and hearing. Its function, as already stated, is to investigate upon the basis of data which the Administrator may submit and which the committee may procure for itself and to report its recommendation with respect to the minimum wage. Cf. *Norwegian Nitrogen Co. v. United States*, supra, 288 U. S. 318, 53 S. Ct. 350, 77 L. Ed. 808. That such is the interpretation of the statute is abundantly supported by its legislative history. See Conference Committee Report, H. Rept. No. 2738, 75th Cong., 3d Sess., p. 31, and the explanation of the bill by the Chairman of the Senate Committee, 83 Cong. Rec. 9164. In his statement he pointed out that the procedure is modeled upon the New York Minimum Wage Act, see *Morehead v. People of State of New York ex rel. Tipaldo*, 298 U. S. 587, 619, 56 S. Ct. 918, 926, 80 L. Ed. 1347, 103 A. L. R. 1445, and he emphasized that no minimum wage rate could be established which had not been first "carefully worked out" by a committee drawn principally from the industry itself and that it should not then be put into effect "by administrative action which has not been found to be in accordance with law by an independent responsible administrative officer of the government, exercising an independent judgment on the evidence after a legal hearing."

The demands of due process do not require a hearing, at the initial stage or at any particular point or at more than one point in an administrative proceeding so long as the requisite hearing is held before the final order becomes effective. The proceedings before the Administrator as provided by § 8 (b) satisfy the requirements of due process without further requirement, which the statute omits, of a hearing on notice before the committee. *York v. Texas*, 137 U. S. 15, 11 S. Ct. 9, 34 L. Ed. 604; *American Surety Co. v. Baldwin*, 287 U. S. 156, 168, 53 S. Ct. 98, 102, 77 L. Ed. 231, 86 A. L. R. 298; *United States v. Illinois Central R. Co.*, 291 U. S. 457, 463, 54 S. Ct. 471, 473, 78 L. Ed. 909. . . .

*Support in the evidence of the Administrator's findings.* By § 10 review of the Administrator's order by the courts is limited to questions

substantial evidence shall be conclusive." Petitioner attacks the Administrator's findings that the 32½ cent minimum will not substantially curtail employment and that classification of the industry is not required, on the ground that they are not supported by substantial evidence.

Since the statute required these findings to be based upon consideration of economic and competitive conditions in the industry, as affected by transportation, living and production costs, including wages, the findings rest, to a substantial degree upon studies of statistical data with respect to these factors gathered by government agencies and published by them officially. They include publications of the Bureau of Labor Statistics, the Interstate Commerce Commission, the Federal Trade Commission, and the Economic Section of the Wage and Hour Division of the Department of Labor. The most important and the principal object of attack is Bulletin No. 663 of the Bureau of Labor Statistics entitled "Wages in Cotton Goods Manufacturing", which is a study of the economic conditions generally prevailing in the cotton textile industry and in particular of the wages of employees. The statistics gathered, if regarded as of probative force, and the inferences drawn from them by the Administrator, taken with other evidence, amply support his findings.

The argument of petitioner is not that the record contains no evidence supporting the findings but rather that this class of evidence must be ignored because not competent in a court of law. But it has long been settled that the technical rules for the exclusion of evidence applicable in jury trials do not apply to proceedings before federal administrative agencies in the absence of a statutory requirement that such rules are to be observed. *Interstate Commerce Commission v. Baird*, 194 U. S. 25, 44, 24 S. Ct. 563, 568, 48 L. Ed. 860; *Interstate Commerce Commission v. Louisville & N. R. Co.*, 277 U. S. 88, 93, 33 S. Ct. 185, 187, 57 L. Ed. 431; *Spiller v. Atchison, Topeka & Santa Fe R. Co.*, 253 U. S. 117, 40 S. Ct. 466, 64 L. Ed. 810; *United States v. Abilene & Southern R. Co.*, 265 U. S. 274, 288, 44 S. Ct. 565, 569, 68 L. Ed. 1016; *John Bene & Sons v. Federal Trade Commission*, 2 Cir., 299 F. 468, 471. We need not consider whether this class of evidence must be excluded from proceedings in court.

Further the documents in question were received in evidence without objection. And even in a court of law if evidence of this character is admitted without objection it is to be considered and must be accorded "its natural probative effect as if it were in law admissible." *Diaz v. United States*, 223 U. S. 442, 450, 32 S. Ct. 250, 251, 252, 56 L. Ed. 500, Ann. Cas. 1913 C, 1138, *Rowland v. St. Louis & San Francisco R. R. Co.*, 244 U. S. 106, 108, 37 S. Ct. 577, 578, 61 L. Ed. 1022; cf. *United States v. Los Angeles & Salt Lake R. Co.*, 273 U. S. 299, 312, 47 S. Ct. 413, 415, 71 L. Ed. 651.



The reliability of the data published in the Bulletin was supported before the Administrator by the testimony of some of his compilers. In the circumstances we think the Bulletin and other documents in question were evidence to be considered by the Administrator; that the weight to be given to them and the inferences to be drawn from them were for the Administrator and not the courts, and that they lend substantial support to his findings.

Further contentions that the findings and particularly the finding that classification in the industry is unnecessary, and the subsidiary findings as to differences in transportation, living, and production costs, are unsupported by substantial evidence are addressed either to the weight and dependability of the evidence supporting the findings or to the testimony of particular witnesses or conflicting evidence on which petitioner relies. We have examined these contentions and, without further elaboration of the details of the evidence, we conclude that the Administrator's findings are supported by substantial evidence. Any different conclusion would require us to substitute our judgment of the weight of the evidence and the inferences to be drawn from it for that of the Administrator which the statute forbids.

Numerous other contentions are advanced by petitioner but they are subsidiary to those which we have already considered, or are of such slight moment as to call for no further discussion.

Affirmed.<sup>19</sup>

**Consolidated Edison Co. v. National Labor Relations Board, Supreme Court of the United States, 1938. 305 U. S. 197, 83 L. Ed. 126, 59 S. Ct. 206.**

[One of the contentions of the company was that the Circuit Court of Appeals below had adopted an inadequate standard of review of the board's findings, thereby sustaining findings not supported by substantial evidence. The statute provides: "The findings of the Board as to the facts, if supported by evidence, shall be conclusive." [29 USCA § 160 (e).]

MR. CHIEF JUSTICE HUGHES delivered the opinion of the court.

The United Electrical and Radio Workers of America, affiliated with the Committee for Industrial Organization, filed a charge, on May 5, 1937, with the National Labor Relations Board that the Consolidated Edison Company of New York and its affiliated companies were interfering with the right of their employees to form, join or assist labor organizations of their own choosing and were contributing financial and other support, in the manner described, to the Inter-

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<sup>19</sup> See Fuchs, "Constitutional Implications of the Opp Cotton Mills Case with Respect to Procedure and Judicial Review in Administrative Rule Making," 27 Wash. Univ. L. Q. 1 (1941); also for brief comments see 35 Ill. L. Rev. 840 (1941); 29 Geo. L. Jour. 882 (1941); 10 Geo. Wash. L. Rev. 219 (1941).

national Brotherhood of Electrical Workers, an affiliate of the American Federation of Labor. The Board issued its complaint and the employing companies, appearing specially, challenged its jurisdiction. On the denial of their request that this question be determined initially, the companies filed answers reserving their jurisdictional objections. After the taking of evidence before a trial examiner, the proceeding was transferred to the Board which on November 10, 1937, made its findings and order.

The order directed the companies to desist from labor practices found to be unfair and in violation of Section 8 (1) and (3) of the National Labor Relations Act, directed reinstatement of six discharged employees with back pay, and required the posting of notices to the effect that the companies would cease the described practices and that their employees were free to join or assist any labor organization for the purpose of collective bargaining and would not be subject to discharge or to any discrimination by reason of their choice. 4 N. L. R. B. 71. . . .

*Third.—The sufficiency of the evidence to sustain the findings of the Board with respect to coercive practices, discrimination and discharge of employees.*—The companies contend that the Court of Appeals misconceived its power to review the findings and, instead of searching the record to see if they were sustained by “substantial” evidence, merely considered whether the record was “wholly barren of evidence” to support them. We agree that the statute, in providing that “the findings of the Board as to the facts, if supported by evidence, shall be conclusive,” means supported by substantial evidence. *Washington, V. & M. Coach Co. v. National Labor Relations Board*, 301 U. S. 142, 147. Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Appalachian Electric Power Co. v. National Labor Relations Board*, 93 F. 2d 985, 989; *National Labor Relations Board v. Thompson Products*, 97 F. 2d 13, 15; *Ballston-Stillwater Co. v. National Labor Relations Board*, 98 F. 2d 758, 760. We do not think that the Court of Appeals intended to apply a different test. In saying that the record was not “wholly barren of evidence” to sustain the finding of discrimination, we think that the court referred to substantial evidence. *Ballston-Stillwater Co. v. National Labor Relations Board*, *supra*.

The companies urge that the Board received “remote hearsay” and “mere rumor.” The statute provides that “the rules of evidence prevailing in courts of law and equity shall not be controlling.” The obvious purpose of this and similar provisions is to free administrative boards from the compulsion of technical rules so that the mere admission of matter which would be deemed incompetent in judicial proceedings would not invalidate the administrative order. *Interstate Commerce Comm’n v. Baird*, 194 U. S. 25, 44; *Interstate Commerce Comm’n*

v. Louisville & Nashville R. Co., 227 U. S. 88, 93; United States v. Abilene & Southern Ry. Co., 265 U. S. 274, 288; Tagg Bros. & Moorhead v. United States, 280 U. S. 420, 442. But this assurance of a desirable flexibility in administrative procedure does not go so far as to justify orders without a basis in evidence having rational probative force. Mere uncorroborated hearsay or rumor does not constitute substantial evidence.

Applying these principles, we are unable to conclude that the Board's findings in relation to the matters now under consideration did not have the requisite foundation. With respect to industrial espionage, the companies say that the employment of "outside investigating agencies" of any sort had been voluntary discontinued prior to November, 1936, but the Board rightly urges that it was entitled to bar its resumption. Compare Federal Trade Commission v. Goodyear Tire & Rubber Co., 304 U. S. 257, 260. In relation to the other charges of unfair labor practices, the companies point to the statement of Mr. Carlisle at a large meeting of the employees in April, 1937, when the recognition of the Brotherhood was under discussion, that the employees were absolutely free to join any labor organization,—that they could do as they pleased. Despite this statement and assuming, as counsel for the companies urges, that where two independent labor organizations seek recognition, it cannot be said to be an unfair labor practice for the employer merely to express preference of one organization over the other, by reason of the former's announced policies, in the absence of any attempts at intimidation or coercion, we think that there was still substantial evidence that such attempts were made in this case.

It would serve no useful purpose to lengthen this opinion by detailing the testimony. We are satisfied that the provisions of the order requiring the companies to desist from the discriminating and coercive practices described in subdivisions (a) to (e) inclusive and in subdivision (h) of paragraph one of its order, and to reinstate the six employees mentioned with back pay, and to post notices assuring freedom from discrimination and coercion as provided in paragraph two of the order, rested upon findings sustained by the evidence and that the decree of the Court of Appeals enforcing the order in these respects should be affirmed . . .

#### **Development of Substantial Evidence Rule.**

Since the enactment of the Clayton Act in 1914, more than twenty significant federal statutes, and uncounted hundreds of state statutes, have adopted provisions that administrative findings shall be conclusive, if supported by substantial evidence (sometimes the word *substantial* is omitted by the legislature, but the courts remedy this oversight by reading it into the statute anyhow). The term has become a standard expression. Its meaning and application, however, became plagued with increasing doubts and uncertainties as the years went by.

Courts were but little disposed to frame any tests to determine the substantiality of evidence. Many vague variants of expression were employed, e. g.: "more than a scintilla . . . such relevant evidence as a reasonable mind might accept as adequate" (Consolidated Edison Co. v. National Labor Relations Board, *supra*); "evidence more than a scintilla, and not unbelievable on its face" (Justice Stone's dissent in *Bridges v. Wixon*, 326 U. S. 135, 89 L. Ed. 2103, 65 S. Ct. 1443 (1945)). The decisions are reviewed by E. Blythe Stason, "Substantial Evidence" in *Administrative Law*," 89 U. of Pa. L. Rev. 1026 (1941). In many cases, the requirement that there be substantial evidence was treated as being approximately the same test as that applied by appellate courts in determining whether or not a jury verdict must be set aside. In fact, courts tended to give greater respect to findings of administrative agencies than to jury verdicts. It came to be generally assumed that if the agency could point in the record to any competent material evidence which tended to support its findings, the latter thereupon became unassailable, regardless of the fact that the overwhelming preponderance of credible testimony pointed in the opposite direction. In a number of cases, federal courts of appeal pointed out that they believed administrative findings to be wrong, but that they considered themselves to be without power to correct the error. Judge Learned Hand said in *National Labor Relations Board v. Standard Oil Co.* (CCA 2nd, 1943), 138 F. (2d) 885: "We understand the law to be that the decision of the Board upon that [factual] issue is for all practical purposes not open to us at all. . . .

" . . . we recognize how momentous may be such an abdication of any power of review . . ." The Supreme Court explained the development in *Universal Camera Corp. v. National Labor Relations Board* (*infra*): " . . . by imperceptible steps regard for the fact-finding function of the Board led to the assumption that the requirements . . . were met when the reviewing court could find in the record evidence which, when viewed in isolation, substantiated the Board's findings." In other words (to borrow an example which one appellate judge sometimes employed during the course of a colloquy between court and counsel, upon oral argument of a case) if one discredited witness said the cat was black, and 10 unimpeached witnesses declared it to be white, there was substantial evidence to support a finding by the agency that the cat was black.

The Attorney General's Committee on Administrative Procedure believed that something should be done to correct this. The majority report (Senate Document No. 8, 77th Congress, 1st Sess., p. 92) after discussing the possibility of amending the statutes controlling the scope of review to authorize the reviewing court to consider the "weight of the evidence" or to reverse if the administrative findings were "clearly erroneous," said:

"Dissatisfaction with the existing standards as to the scope of review derives largely from dissatisfaction with the fact-finding procedures now employed by the administrative bodies. 'The need for review of questions of fact is less if the machinery for the determination of facts inspires confidence; it is greater if it does not.'"

The majority concluded that changes in the fact-finding processes within the agencies would obviate the need for enlargement of the scope of review.

The minority, however, felt that something more was required. Their report declared (p. 210):

"The present scope of judicial review is also subject to question in view of the prevalent interpretations of the 'substantial evidence' rule set forth as a measure of judicial review in many important statutes. Under this interpretation, if what is called 'substantial evidence' is found anywhere in the record to support conclusions of fact, the courts are said to be obliged to sustain the decision without reference to how heavily countervailing evidence may preponderate—unless indeed, the stage of arbitrary decision is reached. Under this interpretation, the courts need to read only one side of the case and, if they find any evidence there, the administrative action is to be sustained and the record to the contrary is to be ignored. The courts, of course, should not weigh meticulously every bit of evidence. Indeed, such a requirement would prove a very undesirable burden. But the courts should set aside decisions *clearly* contrary to the *manifest* weight of the evidence."

The minority recommended a code of administrative procedure which would empower the reviewing court to require

"the support of findings of fact by adequate evidence. The last of these should, obviously we think, mean support of all findings of fact, including inferences and conclusion of fact, upon the *whole* record."

This was a significant suggestion, as revealed by later events. It was probably the first appearance in this particular context of the phrase "upon the whole record." What is the meaning of this? Was the purpose the same as that indicated in *Stork Restaurant v. Boland*, 282 N. Y. 256, 26 N. E. (2d) 247 (1940), where the court said: "The evidence produced by one party must be considered in connection with evidence produced by the other parties"?

The draftsmen of the bill which later became the Federal Administrative Procedure Act went further. That bill, as originally introduced, provided that courts could reverse agency findings "unsupported by competent, material, and substantial evidence upon the whole agency record." The new words here were "competent" and "substantial." What did they add? Were they an adoption of the legal residuum rule? Did they restrict agencies to consideration of evidence that would be admissible in court trials?

This proposal was heatedly opposed by the federal agencies, and this particular section [10 (e)] was amended to provide only that the courts

could reverse agency findings "unsupported by substantial evidence." Did this mean that we were back to the earlier rule that the only evidence to be examined was that which tended to support the agency finding?

To answer this question, it is necessary to consider other sections of the Act which also have a bearing.

Sec. 7 (c) provides in part that:

"no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence."

This was a direction addressed to the agencies. Its meaning, according to the Senate Committee Report (S. Report No. 752, 79th Congress, 1st Sess., p. 22), was that "credible and credited evidence . . . may not be ignored except upon the requisite kind and quality of contrary evidence." The House Committee (House Report No. 1980, 79th Congress, 2d Sess., p. 37) reported that "Where there is evidence pro and con, the agency must weigh it and decide in accordance with the preponderance."

As a direction to the agencies, this seemed quite explicit.

But what power did the reviewing courts have, in ascertaining whether the agencies had complied with these requirements? The last sentence of section 10 (e)—the section which empowered the reviewing courts to set aside agency findings "unsupported by substantial evidence"—declared:

"In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party . . ."

Did this mean that the court should review the whole record to determine whether the agency order had been issued in accordance with "reliable, probative and substantial evidence"?

A statement of the Attorney General appended to the Senate report explained that the bill "is intended to embody the law as declared, for example, in *Consolidated Edison Co. v. N. L. R. B.*" (*supra*).

On the other hand, the House Committee report declared, p. 45:

"it will be the duty of the courts to determine in the final analysis and in the exercise of their independent judgment whether on the whole of the proofs . . . the evidence . . . is sufficiently substantial to support a finding . . ."

This apparent disagreement was rather confusing, to say the least. As the supreme court said in *Universal Camera Corp. v. National Labor Relations Board* (*infra*):

"On the one hand, the sponsors of the legislation indicated that they were reaffirming the prevailing 'substantial evidence' test. But with

equal clarity they expressed disapproval of the manner in which the courts were applying their own standard.”

While the problem is still far from settled, the best available authority on which to base an answer is found in the two following cases:

**Universal Camera Corp. v. National Labor Relations Board, Supreme Court of the United States, 1951. 340 U. S. 474, 95 L. Ed. 456, 71 S. Ct. 456.**

MR. JUSTICE FRANKFURTER delivered the opinion of the court.

The essential issue raised by this case and its companion, *National Labor Relations Board v. Pittsburgh Steamship Co.*, 340 U. S. 498 [95 L. Ed. 479] 71 S. Ct. 453 [infra], is the effect of the Administrative Procedure Act and the legislation colloquially known as the Taft-Hartley Act [5 USCA § 1001 et seq.; 29 USCA § 141 et seq.], on the duty of Courts of Appeals when called upon to review orders of the National Labor Relations Board.

The Court of Appeals for the Second Circuit granted enforcement of an order directing, in the main, that petitioner reinstate with back pay an employee found to have been discharged because he gave testimony under the Wagner Act [29 USCA § 151 et seq.], and cease and desist from discriminating against any employee who files charges or gives testimony under that Act. The court below, Judge Swan dissenting, decreed full enforcement of the order. [2 Cir., 1950] 179 F.2d 749. Because the views of that court regarding the effect of the new legislation on the relation between the Board and the courts of appeals in the enforcement of the Board's orders conflicted with those of the Court of Appeals for the Sixth Circuit <sup>20</sup> we brought both cases here. 339 U. S. 951, 94 L. Ed. 1364, 70 S. Ct. 837 and 339 U. S. 962, 94 L. Ed. 1372, 70 S. Ct. 987. The clash of opinion obviously required settlement by this Court.

## I

Want of certainty in judicial review of Labor Board decisions partly reflects the intractability of any formula to furnish definiteness of content for all the impalpable factors involved in judicial review. But in part doubts as to the nature of the reviewing power and uncertainties

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<sup>20</sup> *National Labor Relations Board v. Pittsburgh S. S. Co.* (CA 6th, 1950), 180 F. (2d) 731; 71 S. Ct. p. 453, infra. The courts of appeals of five circuits have agreed with the court of appeals for the second circuit that no material change was made in the reviewing power. *Eastern Coal Corp. v. National Labor Relations Board* (CA 4th, 1949), 176 F. (2d) 131, 134-136; *National Labor Relations Board v. Booker* (CA 5th, 1950), 180 F. (2d) 727, 729; *National Labor Relations Board v. La Salle Steele Co.* (CA 7th, 1949), 178 F. (2d) 829, 833-834; *National Labor Relations Board v. Minnesota Min. & Mfg. Co.* (CA 8th, 1950), 179 F. (2d) 323, 325-326; *National Labor Relations Board v. Continental Oil Co.* (CA 10th, 1950), 179 F. (2d) 552, 555.

in its application derive from history, and to that extent an elucidation of this history may clear them away.

The Wagner Act provided: "The findings of the Board as to the facts, if supported by evidence, shall be conclusive." Act of July 5, 1935, § 10 (e); 49 Stat. 449, 454, 29 USC § 160 (e). This Court read "evidence" to mean "substantial evidence," *Washington, V. & M. Coach Co. v. Labor Board*, 301 U. S. 142, 81 L. Ed. 965, 57 S. Ct. 648, and we said that "[s]ubstantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co. v. National Labor Relations Board*, 305 U. S. 197, 229, 83 L. Ed. 126, 59 S. Ct. 206, 217. Accordingly, it "must do more than create a suspicion of the existence of the fact to be established. . . . it must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury." *National Labor Relations Board v. Columbian Enameling & Stamping Co.*, 306 U. S. 292, 300, 83 L. Ed. 660, 59 S. Ct. 501, 505.

The very smoothness of the "substantial evidence" formula as the standard for reviewing the evidentiary validity of the Board's findings established its currency. But the inevitably variant applications of the standard to conflicting evidence soon brought contrariety of views and in due course bred criticism. Even though the whole record may have been canvassed in order to determine whether the evidentiary foundation of a determination by the Board was "substantial," the phrasing of this Court's process of review readily lent itself to the notion that it was enough that the evidence supporting the Board's result was "substantial" when considered by itself. It is fair to say that by imperceptible steps regard for the fact-finding function of the Board led to the assumption that the requirements of the Wagner Act were met when the reviewing court could find in the record evidence which, when viewed in isolation, substantiated the Board's findings. Compare *National Labor Relations Board v. Waterman Steamship Corp.*, 309 U. S. 206, 84 L. Ed. 704, 60 S. Ct. 493; *National Labor Relations Board v. Bradford Dyeing Ass'n*, 310 U. S. 318, 84 L. Ed. 1226, 60 S. Ct. 918; and see *National Labor Relations Board v. Nevada Consolidated Copper Corp.*, 316 U. S. 105, 86 L. Ed. 1305, 62 S. Ct. 960. This is not to say that every member of this Court was consciously guided by this view or that the Court ever explicitly avowed this practice as doctrine. What matters is that the belief justifiably arose that the Court had so construed the obligation to review.<sup>21</sup>

Criticism of so contracted a reviewing power reinforced dissatisfaction felt in various quarters with the Board's administration of the

<sup>21</sup> See the testimony of Dean Stason before the Subcommittee of the Senate Committee on the Judiciary in 1941. Hearings on S. 674, 77th Cong. 1st Sess. 1355-1360.



Wagner Act in the years preceding the war. The scheme of the Act was attacked as an inherently unfair fusion of the functions of prosecutor and judge. Accusations of partisan bias were not wanting. The "irresponsible admission and weighing of hearsay, opinion, and emotional speculation in place of factual evidence" was said to be a "serious menace." No doubt some, perhaps even much, of the criticism was baseless and some surely was reckless. What is here relevant, however, is the climate of opinion thereby generated and its effect on Congress. Protests against "shocking injustices" and intimations of judicial "abdication" with which some courts granted enforcement of the Board's orders stimulated pressures for legislative relief from alleged administrative excesses.

The strength of these pressures was reflected in the passage in 1940 of the Walter-Logan Bill. It was vetoed by President Roosevelt, partly because it imposed unduly rigid limitations on the administrative process, and partly because of the investigation into the actual operation of the administrative process then being conducted by an experienced committee appointed by the Attorney General. It is worth noting that despite its aim to tighten control over administrative determinations of fact, the Walter-Logan Bill contented itself with the conventional formula that an agency's decision could be set aside if "the findings of fact are not supported by substantial evidence."

The final report of the Attorney General's Committee was submitted in January, 1941. The majority concluded that "[d]issatisfaction with the existing standards as to the scope of judicial review derives largely from dissatisfaction with the fact-finding procedures now employed by the administrative bodies." Departure from the "substantial evidence" test, it thought, would either create unnecessary uncertainty or transfer to courts the responsibility for ascertaining and assaying matters the significance of which lies outside judicial competence. Accordingly, it recommended against legislation embodying a general scheme of judicial review.<sup>22</sup>

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<sup>22</sup> Referring to proposals to enlarge the scope of review to permit inquiry whether the findings are supported by the weight of the evidence, the majority said:

" . . . Assuming that such a change may be desirable with respect to special administrative determinations, there is serious objection to its adoption for general application.

"In the first place there is the question of how much change, if any, the amendment would produce. The respect that courts have for the judgments of specialized tribunals which have carefully considered the problems and the evidence cannot be legislated away. The line between 'substantial evidence' and 'weight of evidence' is not easily drawn—particularly when the court is confined to a written record, has a limited amount of time, and has no opportunity further to question witnesses on testimony which seems hazy or leaves some lingering doubts unanswered. 'Substantial evidence' may well be equivalent to

Three members of the Committee registered a dissent. Their view was that the "present system or lack of system of judicial review" led to inconsistency and uncertainty. They reported that under a "prevalent" interpretation of the "substantial evidence" rule "if what is called 'substantial evidence' is found anywhere in the record to support conclusions of fact, the courts are said to be obliged to sustain the decision without reference to how heavily the countervailing evidence may preponderate—unless indeed the stage of arbitrary decision is reached. Under this interpretation, the courts need to read only one side of the case and, if they find any evidence there, the administrative action is to be sustained and the record to the contrary is to be ignored." Their view led them to recommend that Congress enact principles of review applicable to all agencies not excepted by unique characteristics. One of these principles was expressed by the formula that judicial review could extend to "findings, inferences, or conclusions of fact unsupported, upon the whole record, by substantial evidence."<sup>23</sup> So far as the history of

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the 'weight of evidence' when a tribunal in which one has confidence and which had greater opportunities for accurate determination has already so decided.

"In the second place the wisdom of a general change to review of the 'weight of evidence' is questionable. If the change would require the courts to determine independently which way the evidence preponderates, administrative tribunals would be turned into little more than media for transmission of the evidence to the courts. It would destroy the values of adjudication of fact by experts or specialists in the field involved. It would divide the responsibility for administrative adjudications." Final Report, 91-92.

<sup>23</sup> The minority enumerated four "existing deficiencies" in judicial review. These were (1) "the haphazard, uncertain, and variable results of the present system or lack of system of judicial review," (2) the interpretation permitting substantiality to be determined without taking into account conflicting evidence, (3) the failure of existing formulas "to take account of differences between the various types of fact determinations," and (4) the practice of determining standards of review by "case-to-case procedure of the courts." They recommended that

"Until Congress finds it practicable to examine into the situation of particular agencies, it should provide more definitely by general legislation for both the availability and scope of judicial review in order to reduce uncertainty and variability. As the Committee recognizes in its report, there are several principal subjects of judicial review—including constitutional questions, statutory interpretation, procedure, and the support of findings of fact by adequate evidence. The last of these should, obviously we think, mean support of all findings of fact, including inferences and conclusion of fact, upon the *whole* record. Such a legislative provision should, however, be qualified by a direction to the courts to respect the experience, technical competence, specialized knowledge, and discretionary authority of each agency. We have framed such a provision in the appendix to this statement." Id. 210-212.

The text of the recommended provision is as follows:

"(e) *Scope of review.*—As to the findings, conclusions, and decisions in any case, the reviewing court, regardless of the form of the review proceeding, shall consider and decide so far as necessary to its decision and where raised by the

this movement for enlarged review reveals, the phrase "upon the whole record" makes its first appearance in this recommendation of the minority of the Attorney General's Committee. This evidence of the close relationship between the phrase and the criticism out of which it arose is important, for the substance of this formula for judicial review found its way into the statute books when Congress with unquestioning—we might even say uncritical—unanimity enacted the Administrative Procedure Act.<sup>24</sup>

One is tempted to say "uncritical" because the legislative history of that Act hardly speaks with that clarity of purpose which Congress supposedly furnishes courts in order to enable them to enforce its true will. On the one hand, the sponsors of the legislation indicated that they

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parties, all relevant questions of: (1) constitutional right, power, privilege, or immunity; (2) the statutory authority or jurisdiction of the agency; (3) the lawfulness and adequacy of procedure; (4) findings, inferences, or conclusions of fact unsupported, upon the whole record, by substantial evidence; and (5) administrative action otherwise arbitrary or capricious. *Provided, however*, That upon such review due weight shall be accorded the experience, technical competence, specialized knowledge, and legislative policy of the agency involved as well as the discretionary authority conferred upon it." Id. 246-247.

<sup>24</sup> 60 Stat. 237, 5 USC § 1001 et seq., 5 USCA § 1001 et seq. The form finally adopted reads as follows:

"Sec. 10. Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion. . . .

"(e) Scope of Review.—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the *whole* record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error." 60 Stat. 243-244, 5 USC § 1009 (e). (*Italics ours.*)

In the form in which the bill was originally presented to Congress, clause (B)(5) read, "unsupported by competent, material, and substantial evidence upon the whole agency record as reviewed by the court in any case subject to the requirements of sections 7 and 8"; H. R. 1203, 79th Cong., 1st Sess., quoted in S. Doc. No. 248, 79th Cong., 2d Sess. 155, 160. References to competency and materiality of evidence were deleted and the final sentence added by the Senate Committee. S. Rep. No. 752, 79th Cong., 1st Sess. 28; S. Doc. No. 248, *supra*, 39-40, 214. No reason was given for the deletion.

were reaffirming the prevailing "substantial evidence" test.<sup>25</sup> But with equal clarity they expressed disapproval of the manner in which the courts were applying their own standard. The committee reports of both houses refer to the practice of agencies to rely upon "suspicion, surmise, implications, or plainly incredible evidence," and indicate that courts are to exact higher standards "in the exercise of their independent judgment" and on consideration of "the whole record."<sup>26</sup>

Similar dissatisfaction with too restricted application of the "substantial evidence" test is reflected in the legislative history of the Taft-Hartley Act. The bill as reported to the House provided that the "findings of the Board as to the facts shall be conclusive unless it is made to appear to the satisfaction of the court either (1) that the findings of fact are against the manifest weight of the evidence, or (2) the findings of fact are not supported by substantial evidence." The bill left the House with this provision. Early committee prints in the Senate provided for review by "weight of the evidence" or "clearly erroneous" standards. But, as the Senate Committee Report relates, "it was finally decided to conform the statute to the corresponding section of the Administrative Procedure Act where the substantial evidence test prevails. In order to clarify any ambiguity in that statute, however, the

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<sup>25</sup> A statement of the Attorney General appended to the Senate Report explained that the bill "is intended to embody the law as declared, for example, in *Consolidated Edison Co. v. National Labor Relations Board*, 305 U. S. 197 [83 L. Ed. 126, 59 S. Ct. 206 (1938)]" Section 10 (e) of Appendix B to S. Rep. No. 752, *supra*, reprinted in S. Doc. No. 248, *supra*, 230. Mr. McFarland, then Chairman of the American Bar Association Committee on Administrative Law, testified before the House Judiciary Committee to the same effect. *Id.*, 85-86.

<sup>26</sup> The following quotation from the report of the Senate Judiciary Committee indicates the position of the sponsors. "The 'substantial evidence' rule set forth in section 10(e) is exceedingly important. As a matter of language, substantial evidence would seem to be an adequate expression of law. The difficulty comes about in the practice of agencies to rely upon (and of courts to tacitly approve) something less—to rely upon suspicion, surmise, implications, or plainly incredible evidence. It will be the duty of the courts to determine in the final analysis and in the exercise of their independent judgment, whether on the whole record the evidence in a given instance is sufficiently substantial to support a finding, conclusion, or other agency action as a matter of law. In the first instance, however, it will be the function of the agency to determine the sufficiency of the evidence upon which it acts—and the proper performance of its public duties will require it to undertake this inquiry in a careful and dispassionate manner. Should these objectives of the bill as worded fail, supplemental legislation will be required." S. Rep. No. 752, *supra*, 30-31. The House Committee Report is to substantially the same effect. H. R. Rep. No. 1980, 79th Cong., 2d Sess. 45. The reports are reprinted in S. Doc. No. 248, *supra*, 216-217, 279.

See also the response of Senator McCarran in debate, to the effect that the bill changed the "rule" that courts were "powerless to interfere" when there "was no probative evidence." *Id.* 322. And see the comment of Congressman Springer a member of the House Judiciary Committee, *id.*, 376.

committee inserted the words 'questions of fact, if supported by substantial evidence *on the record considered as a whole . . .*' <sup>27</sup>

This phraseology was adopted by the Senate. The House conferees agreed. They reported to the House: "It is believed that the provisions of the conference agreement relating to the courts' reviewing power will be adequate to preclude such decisions as those in *N. L. R. B. v. Nevada Consol. Copper Corp.* (316 U. S. 105) [86 L. Ed. 1305, 62 S. Ct. 960] and in the *Wilson, Columbia Products, Union Pacific Stages, Hearst, Republic Aviation, and Le Tourneau, etc.,* cases, *supra*, without unduly burdening the courts." The Senate version became the law.

It is fair to say that in all this Congress expressed a mood. And it expressed its mood not merely by oratory but by legislation. As legislation that mood must be respected, even though it can only serve as a standard for judgment and not as a body of rigid rules assuring sameness of application. Enforcement of such broad standards implies subtlety of mind and solidity of judgment. But it is not for us to question that Congress may assume such qualities in the federal judiciary.

From the legislative story we have summarized, two concrete conclusions do emerge. One is the identity of aim of the Administrative Procedure Act and the Taft-Hartley Act regarding the proof with which the Labor Board must support a decision. The other is that now Congress has left no room for doubt as to the kind of scrutiny which a court of appeals must give the record before the Board to satisfy itself that the Board's order rests on adequate proof.

It would be mischievous word-playing to find that the scope of review under the Taft-Hartley Act is any different from that under the Administrative Procedure Act. The Senate Committee which reported the review clause of the Taft-Hartley Act expressly indicated that the two standards were to conform in this regard, and the wording of the two Acts is for purposes of judicial administration identical. And so we hold that the standard of proof specifically required of the Labor

<sup>27</sup> See S. Rep. No. 105, 80th Cong., 1st Sess. 26-27, reprinted in 1 Legislative History 432-433. The Committee did not explain what the ambiguity might be; and it is to be noted that the phrase it italicized is indistinguishable in content from the requirement of § 10(e) of the Administrative Procedure Act that "the court shall review the whole record or such portions thereof as may be cited by any party . . ."

Senator Taft gave this explanation to the Senate of the meaning of the section: "In the first place, the evidence must be substantial; in the second place, it must still look substantial when viewed in the light of the entire record. That does not go so far as saying that a decision can be reversed on the weight of the evidence. It does not go quite so far as the power given to a circuit court of appeals to review a district-court decision, but it goes a great deal further than the present law, and gives the court greater opportunity to reverse an obviously unjust decision on the part of the National Labor Relations Board." From the debate as reprinted in 2 Legislative History 1014.

Board by the Taft-Hartley Act is the same as that to be exacted by courts reviewing every administrative action subject to the Administration Procedure Act.

Whether or not it was ever permissible for courts to determine the substantiality of evidence supporting a Labor Board decision merely on the basis of evidence which in and of itself justified it, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn, the new legislation definitely precludes such a theory of review and bars its practice. The substantiality of evidence must take into account whatever in the record fairly detracts from its weight. This is clearly the significance of the requirement in both statutes that courts consider the whole record. Committee reports and the adoption in the Administrative Procedure Act of the minority views of the Attorney General's Committee demonstrate that to enjoin such a duty on the reviewing court was one of the important purposes of the movement which eventuated in that enactment.

To be sure, the requirement for canvassing "the whole record" in order to ascertain substantiality does not furnish a calculus of value by which a reviewing court can assess the evidence. Nor was it intended to negative the function of the Labor Board as one of those agencies presumably equipped or informed by experience to deal with a specialized field of knowledge, whose findings within that field carry the authority of an expertness which courts do not possess and therefore must respect. Nor does it mean that even as to matters not requiring expertise a court may displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*. Congress has merely made it clear that a reviewing court is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view.

There remains then the question whether enactment of these two statutes has altered the scope of review other than to require that substantiality be determined in the light of all that the record relevantly presents. A formula for judicial review of administrative action may afford grounds for certitude but cannot assure certainty of application. Some scope for judicial discretion in applying the formula can be avoided only by falsifying the actual process of judging or by using the formula as an instrument of futile casuistry. It cannot be too often repeated that judges are not automata. The ultimate reliance for the fair operation of any standard is a judiciary of high competence and character and the constant play of an informed professional critique upon its work.

Since the precise way in which courts interfere with agency findings cannot be imprisoned within any form of words, new formulas attempting to rephrase the old are not likely to be more helpful than the old. There are no talismanic words that can avoid the process of judgment. The difficulty is that we cannot escape, in relation to this problem, the use of undefined defining terms.

Whatever changes were made by the Administrative Procedure and Taft-Hartley Acts are clearly within this area where precise definition is impossible. Retention of the familiar "substantial evidence" terminology indicates that no drastic reversal of attitude was intended.

But a standard leaving an unavoidable margin for individual judgment does not leave the judicial judgment at large even though the phrasing of the standard does not wholly fence it in. The legislative history of these Acts demonstrates a purpose to impose on courts a responsibility which has not always been recognized. Of course it is a statute and not a committee report which we are interpreting. But the fair interpretation of a statute is often "the art of proliferating a purpose," *Brooklyn National Corp. v. Commissioner*, 2 Cir., 157 F.2d 450, 451, revealed more by the demonstrable forces that produced it than by its precise phrasing. The adoption in these statutes of the judicially-constructed "substantial evidence" test was a response to pressures for stricter and more uniform practice, not a reflection of approval of all existing practices. To find the change so elusive that it cannot be precisely defined does not mean it may be ignored. We should fail in our duty to effectuate the will of Congress if we denied recognition to expressed Congressional disapproval of the finality accorded to Labor Board findings by some decisions of this and lower courts, or even of the atmosphere which may have favored those decisions.

We conclude, therefore, that the Administrative Procedure Act and the Taft-Hartley Act direct that courts must now assume more responsibility for the reasonableness and fairness of Labor Board decisions than some courts have shown in the past. Reviewing courts must be influenced by a feeling that they are not to abdicate the conventional judicial function. Congress has imposed on them responsibility for assuring that the Board keeps within reasonable grounds. That responsibility is not less real because it is limited to enforcing the requirement that evidence appear substantial when viewed, on the record as a whole, by courts invested with the authority and enjoying the prestige of the Courts of Appeals. The Board's findings are entitled to respect; but they must nonetheless be set aside when the record before a Court of Appeals clearly precludes the Board's decision from being justified by a fair estimate of the worth of the testimony of witnesses or its informed judgment on matters within its special competence or both.

From this it follows that enactment of these statutes does not require every court of appeals to alter its practice. Some—perhaps a majority—

have always applied the attitude reflected in this legislation. To explore whether a particular court should or should not alter its practice would only divert attention from the application of the standard now prescribed to a futile inquiry into the nature of the test formerly used by a particular court.

Our power to review the correctness of application of the present standard ought seldom to be called into action. Whether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has placed in the keeping of the Courts of Appeals. This Court will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied.

## II

Our disagreement with the view of the court below that the scope of review of Labor Board decisions is unaltered by recent legislation does not of itself, as we have noted, require reversal of its decision. The court may have applied a standard of review which satisfied the present Congressional requirement.

The decision of the Court of Appeals is assailed on two grounds. It is said (1) that the court erred in holding that it was barred from taking into account the report of the examiner on questions of fact insofar as that report was rejected by the Board, and (2) that the Board's order was not supported by substantial evidence on the record considered as a whole, even apart from the validity of the court's refusal to consider the rejected portions of the examiner's report.

The latter contention is easily met. It is true that two of the earlier decisions of the court below were among those disapproved by Congress.<sup>28</sup> But this disapproval, we have seen, may well have been caused by unintended intimations of judicial phrasing. And in any event, it is clear from the court's opinion in this case that it in fact did consider the "record as a whole," and did not deem itself merely the judicial echo of the Board's conclusion. The testimony of the company's witnesses was inconsistent, and there was clear evidence that the complaining employee had been discharged by an officer who was at one time influenced against him because of his appearance at the Board hearing. On such a record we could not say that it would be error to grant enforcement.

The first contention, however, raises serious questions to which we now turn.

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<sup>28</sup> National Labor Relations Board v. Standard Oil Co. (CCA 2nd, 1943), 138 F. (2d) 885; National Labor Relations Board v. Columbia Products Corp. (CCA 2nd, 1944), 141 F. (2d) 687.



[The Court thereupon proceeded to consider the first of the two grounds on which the decision of the Court of Appeals was assailed. It was decided that on this point the Court of Appeals was in error.]

Judgment vacated and cause remanded.<sup>29</sup>

**Pittsburgh S. S. Co. v. National Labor Relations Board.**

The turbulent history of this case, raising many questions as to the "fair trial" requirement as well as the "substantial evidence" rule, can be best understood by reading four successive decisions rendered in different stages of the case. Excerpts therefrom are reproduced below:

I

**(6th Cir. 1948) 167 F. (2d) 126**

Upon the filing of the petition to review and set aside an order of the National Labor Relations Board, the Board responds with a request for its enforcement. The petitioner assails the order on the ground that the Board made no independent findings; that the findings and conclusions of the trial examiner, which it adopted, were arbitrary and biased; and that the evidence fails to establish the unfair labor practices upon which the Board's order was based.

. . . A careful examination of the record will demonstrate, it contends, that the trial examiner emerges not as an impartial trier of the facts but as a zealous advocate of the union. Every witness who testified for the union was found to be reliable and truthful, and all who were called by the petitioner, evasive and unreliable. Not one of the petitioner's witnesses who testified concerning the alleged unfair labor practices, was trustworthy, and the veracity and good faith of no witness for the union was questioned. This situation, it is contended, is not only unique but portrays either a complete lack of judicial approach on the part of the examiner, or, what is more serious, a damaging bias in favor of the union. The union's witnesses were all union organizers headed by the union's vice-president. The petitioner's witnesses included the masters, mates, chief engineers and other employees entrusted with great responsibility in the operation of its vessels. Moreover, such officers as were charged with having committed unfair labor practices were employed on but 7 of the 73 ships of the petitioner's fleet, and though they had been instructed by the petitioner that its attitude toward organization was a neutral one, their conduct was held to be in pursu-

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<sup>29</sup> The meaning and implications of the court's decision in this case are exhaustively explored by Louis L. Jaffe, "Judicial Review: 'Substantial Evidence on the Whole Record,'" 64 Harv. L. Rev. 1233 (1951). For shorter comments, see 39 Ill. B. J. 608 (1951); 35 Minn. L. Rev. 661 (1951); 25 So. Calif. L. Rev. 345 (1952).

ance of a general purpose to coerce and intimidate the unlicensed seamen in their efforts at organization, according to a defined pattern.

If the charges of bias are substantially true, it must follow that the trial examiner's findings are not entitled to credence and that their infirmity must be imputed to the Board, for "a trial by a biased judge is not in conformity with 'due process of law.'" *N. L. R. B. v. Ford Motor Co.*, 6 Cir., 114 F. (2d) 905; *Berkshire Employees Assn. v. N. L. R. B.*, 3 Cir., 121 F. (2d) 235. "When the fault of bias and prejudice in a judge first rears its ugly head, its effect remains throughout the whole proceeding." *N. L. R. B. v. Phelps*, 5 Cir., 136 F. (2d) 562, 563, and bias on the part of a trial examiner may be so prejudicial that enforcement must be denied. *N. L. R. B. v. Western Cartage Co.*, 2 Cir., 138 F. (2d) 551.

This challenge to the verity of the findings and the validity of the order has led us to a careful consideration of the record. Without exception, whenever there was a conflict of evidence, the witnesses for the petitioner were held to be untrustworthy and those for the union reliable. Captain Brinker of the steamer *William J. Filbert*, gave evidence that was held to be highly improbable and McGuinness, a member of a rival labor organization, corroborating portions of his testimony, was deemed "generally indefinite, contradictory and unreliable," though Lee, an organizer, by his demeanor and candor, impressed the examiner as a completely credible witness. The union seamen on the *Horace Johnson* and the *McGonagle*, were characterized as forthright witnesses and their testimony credited as fact. The testimony of Captain Lawless of the *Robert W. Bunson*, was held to be less reasonable than that of seaman Vogt. Third Mate Carr is discredited upon the testimony of Vogt. On the *Peter A. B. Widener*, Captain Lehne, master of the vessel, gave testimony which was held to be "indefinite, evasive and lacking in conviction," whereas Babin, a seaman, impressed the examiner as a truthful witness. Hungar, the chief engineer, was "confused, contradictory and unreliable." On the steamer *Samuel F. B. Morse*, the examiner found Zmrazek, a seaman, truthful, while Captain Gerlach was "evasive, contradictory and improbable," and an unreliable witness. Captain Murray of the steamer *Irving S. Olds*, was "generally evasive, at times improbable and inconsistent," while First Mate Dobson "lacked conviction" and was not credited. Third Mate Hewer was "vague, hesitant and generally unconvincing," and his demeanor did not invite credence. Shartle's testimony, on the other hand, impressed the examiner as reasonable and probable. Second Mate Chrobak, who contradicted Shartle, gave testimony that appeared to be "greatly exaggerated and unreliable." It lacked conviction. On the same point, Mates Dobson and Hewer were too general in their testimony to permit appraisal.

Courts have recognized that it is contrary to human experience that all witnesses on one side of a case are falsifiers while those on the other

side are all truthful, and this conclusion must be obvious to anyone with even a minimum experience as a trier of facts. It was said in the Second Circuit Court of Appeals, "If an administrative agency ignores all the evidence given by one side in a controversy, and with studied design gives credence to the testimony of the other side, the findings would be arbitrary and not in accord with the legal requirement." *N. L. R. B. v. Sartorius & Co.*, 140 F. (2d) 203, 205. We expressed a similar view in *N. L. R. B. v. Grieder Machine Tool & Die Co.*, 6 Cir., 142 F. (2d) 163. In *N. L. R. B. v. McGough Bakeries Corp.*, 5 Cir., 153 F. (2d) 420, 421, the court observed: "The intermediate report of the trial examiner seems to us more like a trial argument than a judicial deliverance. Every issue without exception he found in favor of the Union. He resolved every conflict in testimony, whether serious or trivial, in favor of the Union. With complete consistency he found every witness for the Union reliable and truthful, and every opposing witness, whether the Company's president and supervisors, or Independent's adherents, untruthful and unreliable." These observations in one form or another, might be multiplied, and apply with remarkable fidelity to the findings in the present case. It is enough to say that the unvarying repudiation of every witness for the petitioner because of falsity, evasion or faint recollection, along with the consistent exaltation of every union witness as truthful, forthright and accurate, destroys completely any confidence that might otherwise be placed in the findings of the trial examiner and stamp[s] them as arbitrary. The Labor Board having adopted them in toto, its blanket pro forma findings are in no better posture. It is true that courts have sometimes affirmed the Board's orders while severely criticizing the attitude of the examiner, but in such cases the Board's findings were independently made with exacting analysis of the evidence upon which they rest, and a judicious screening of unsupported findings. This is not the situation here. With due respect for the rule that the findings of the Board are binding upon us if based upon evidence, it becomes impossible to sustain an order upon the adoption of a trial examiner's report, which, upon its face, so clearly bears the imprint of bias and prejudice that it lacks all semblance of fair judicial determination.

## II

337 U. S. 656, 93 L. Ed. 1602, 69 S. Ct. 1283 (1949)

Two months later respondent petitioned the Court of Appeals to review the Board's order; the Board filed a counterpetition for enforcement of the order. On April 5, 1948, the court announced its decision refusing enforcement. 167 F. (2d) 126. The court did not determine whether the evidence, if credited, would support the findings. Instead it held the findings and the order based thereon invalidated by the latent, pervasive and unremedied bias of the trial examiner—a bias

found apparent on the face of the record: "Without exception, whenever there was a conflict of evidence, the witnesses for the [Company] were held to be untrustworthy and those for the union reliable. . . . It is enough to say that the unvarying repudiation of every witness for the petitioner because of falsity, evasion or faint recollection, along with the consistent exaltation of every union witness as truthful, forthright and accurate, destroys completely any confidence that might otherwise be placed in the findings of the trial examiner and stamp[s] them as arbitrary. The Labor Board having adopted them in toto, its blanket pro forma findings are in no better posture. . . . With due respect for the rule that the findings of the Board are binding upon us if based upon evidence, it becomes impossible to sustain an order upon the adoption of a trial examiner's report which, upon its face, so clearly bears the imprint of bias and prejudice that it lacks all semblance of fair judicial determination." 167 F. (2d) at 128-129. To review the court's determination, we granted certiorari. 335 U. S. 857.

*First:* We are constrained to reject the court's conclusion that an objective finder of fact could not resolve all factual conflicts arising in a legal proceeding in favor of one litigant. The ordinary lawsuit, civil or criminal, normally depends for its resolution on which version of the facts in dispute is accepted by the trier of fact. Where the number of facts in dispute increases, the arithmetical chance of their uniform resolution diminishes—but it does not disappear. Yet it is not mere arithmetical chance which controls our present inquiry, for the facts disputed in litigation are not random unknowns in isolated equations—they are facets of related human behavior, and the chiseling of one facet helps to mark the borders of the next. Thus, in the determination of litigated facts, the testimony of one who has been found unreliable as to one issue may properly be accorded little weight as to the next. Accordingly, total rejection of an opposed view cannot of itself impugn the integrity or competence of a trier of fact. The gist of the matter has been put well by the Court of Appeals for the Fifth Circuit, speaking through Judge Hutcheson, in granting enforcement of an NLRB order:

"The fact alone . . . of which Respondent makes so much, that Examiner and Board uniformly credited the Board's witnesses and as uniformly discredited those of the Respondent, though the Board's witnesses were few and the Respondent's witnesses were many, would not furnish a basis for a finding by us that such a bias or partiality existed and therefore the hearings were unfair. Unless the credited evidence . . . carries its own death wound, that is, is incredible and therefore, cannot in law be credited, and the discredited evidence . . . carries its own irrefutable truth, that is, is of such nature that it cannot in law be discredited, we cannot determine that to credit the one and discredit the other is an evidence of bias."

Suffice it to say in this case that our attention has been called to no credited testimony which "carries its own death wound," and to none discredited which "carries its own irrefutable truth." Indeed, careful scrutiny of the record belies the view that the trial examiner did in fact believe all union testimony or that he even believed the union version of every disputed factual issue. Rather, the printed transcript suggests thoughtful and discriminating evaluation of the facts.

*Second:* A question remains as to the proper disposition of this case. It is urged upon us by the Board that, there being substantial evidence in the record to support the Board's findings and order, we should remand the case with instructions to enforce the Board's order without further delay. Without doubting the existence here of evidence substantial enough under the Wagner Act, *Consolidated Edison Co. v. Labor Board*, 305 U. S. 197, 229, to warrant the Board's findings, we are not certain whether that standard controls this case. For questions have arisen whether the Administrative Procedure Act, 60 Stat. 237, 5 USC § 1001 et seq., and the Taft-Hartley Act, 61 Stat. 136, 29 USC (1946 ed., Supp. I), § 141 et seq., enacted between issuance of the Board's order and the Court of Appeals' decision, are applicable to and, if applicable, in any way affect Board procedures and the scope of judicial review of Board orders. The applicability and possible effect of either or both of these statutes apparently were not dealt with by the Court of Appeals, which neither discussed the statutes nor cited cases discussing them; the statutes and their impact have not been briefed with any elaboration before this Court. These questions should be considered in the first instance by the Court of Appeals. Accordingly, in order to afford such an opportunity, we remand the cause to the Court of Appeals for proceedings not inconsistent with this opinion.

### III

#### (6th Cir. 1950) 180 F. (2d) 731

. . . The Supreme Court remanded the case to this court for consideration of the applicability and possible effect both upon Board procedures and the scope of judicial review of Board orders of the Administrative Procedure Act. . . .

The applicable provisions of the Administrative Procedure Act are contained in §§ 1006(c), 1009(a), (c) and (e). They relate to evidence and judicial review. The relevant sections of the Taft-Hartley Act are contained in §§ 158(c), 160(b), (c) and (e). They relate not only to rules of evidence and procedure in the trial of labor cases and review in this court, but also to the expression of opinion and to the reinstatement and payment of back pay to employees suspended or discharged.

Both of these statutes are remedial. *Republic Steel Corp. v. National Labor Relations Board*, 311 U. S. 7, 10, 61 S. Ct. 77, 85 L. Ed. 6. A remedial provision is applicable to pending actions. *Ex parte Collet*,

337 U. S. 55, 69 S. Ct. 944, 959. In accordance with this rule since the decision of the Board preceded the enactment and the review was subsequent to the enactment, the Administrative Procedure Act and the Taft-Hartley Act were applicable to the judicial review.

The Board concedes that the review in this court is controlled by the two statutes, but contends that the scope of judicial review as to findings of fact has in no way been affected by them. We think this contention is erroneous. The provisions of § 10(e) of the Administrative Procedure Act that the reviewing court shall hold unlawful and set aside agency action, findings and conclusions found to be "unsupported by substantial evidence" and that in making this determination the court shall "review the whole record," is new. Moreover, the rules concerning evidence have been expressly changed by both the Taft-Hartley Act and the Administrative Procedure Act. Section 10(b) of the Wagner Act provided that "rules of evidence prevailing in courts of law or equity shall not be controlling," and the Board's findings of fact were made conclusive by that statute [§ 10(e)] if they were "supported by evidence." In the Taft-Hartley Act [§ 10(b)] Congress eliminated this language and substituted a provision that hearings "shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States." Section 10(c) of the Wagner Act was amended to require decision of the Board to be supported by "the preponderance of the testimony taken," and § 10(f) was amended to provide that the findings of the Board with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive.

Section 7(c) of the Administrative Procedure Act is new and emphatic. It provides as follows:

" . . . Any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence and no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence. . . ."

These statutes were designed to eliminate the wholesale use of hearsay, the drawing of expert inferences not based upon evidence, and the consideration of only one part or one side of the case.

...  
We assume that evidence admitted before the Board may be relied on to support its decision, and also may be relied on by petitioner. Although not expressly directed, we also assume that we are expected, in light of the new enactments, to reconsider the record, for the Supreme Court will not ordinarily pass upon a case until a lower court has made findings upon the facts. *Nat. Labor Relations Board v. Donnelly Gar-*

ment Co., 330 U. S. 219, 237, 67 S. Ct. 756, 91 L. Ed. 854. When the Supreme Court remanded the instant case with the direction to consider the effect of these statutes, we think it did not expect us to pass upon that question *in vacuo*. Necessarily the effect of these statutes upon the case means their effect as applied to the facts of the case. We therefore proceed to inquire, upon a consideration of the whole record, whether the order sought to be enforced is supported by the reliable, probative, and substantial evidence and is in accordance with law.

The entire case is bottomed by the Board on what it finds to be the adoption by the petitioner of a general course of coercive conduct prior to the labor election of June, 1944, to which it had consented. The petitioner contends that no substantial evidence to this effect exists.

#### The Ferbert Letters.

The finding that a general course of coercive conduct existed is based largely upon the letters signed by petitioner's president, A. H. Ferbert, and sent to each of petitioner's unlicensed employees. . . .

The examiner found:

"The suggestion that the employees' selection of the Union would result in a forfeiture by the employees of their opportunities for promotion represented a misstatement of the Union's position in that respect. As shown by the uncontradicted and credited testimony of Jack Lawrenson, the Union's vice-president, it is the policy of the Union to allow promotions of qualified seamen under the circumstances indicated in the letter, and it is only an unfilled vacancy arising after any such promotion has been made that must be filled from the rotary hiring list. Ferbert's statements concerning the wage stabilization laws, while not literally inaccurate, nevertheless contained implications which were misleading. Their formulation was such as to convey the impression that collective bargaining would be fruitless since all wage increases had been banned by the governmental wage stabilization policy. Actually, of course, the fact that wages generally were frozen during the war period did not preclude wage adjustments under certain circumstances. Moreover, the letters gave an erroneous impression that collective bargaining was limited to the question of wages, ignoring other conditions of employment in which collective bargaining can be a factor, such as working rules and the adjustment of grievances."

Upon this ground the examiner found that the letters formed an integral part of a general course of coercive conduct.

These findings, which were approved by the Board, in important particulars are supported by no evidence. The assertion that the letters give an erroneous impression that collective bargaining is limited to the question of wages can not be maintained in view of the express statement in the letter dated May 2, 1944. In calling attention of the employees to the election, the first Ferbert letter states that the question

to be decided is whether the unlicensed employees are to have for their exclusive bargaining agent the N. M. U. (CIO) "with the sole and exclusive right to represent you in all matters regarding rates of pay, wages, hours of employment, and other conditions of employment."

The statement in the letter of May 2, 1944, with reference to the question of wage rates being in the hands of the Government during the war emergency was true. The statement in the letter of June 1, 1944, with reference to rotary hiring was true. In its pertinent portions it read:

"You should carefully consider some of the issues which have been referred to by the Union . . . one is 'rotary hiring.' To make sure that you understand what this means . . . it means that you are entitled to return to the same ship in the spring that you laid up the previous fall, but if you are following an engineer or mate, and want to work with him, and he is promoted, he cannot hire you. This is called 'fleet seniority.' Again, if you ship out as a deckwatch, you cannot be promoted to a watchman or lookout when there is a vacancy. The vacancy must be filled by the man at the top of the list at the Union Hall. If you do not go back to the same ship in the spring, you register at the Union Hall and work your way up to the top of the list, and take the first opening for the position you are seeking, whether it be in our fleet or some other fleet. If you refuse the position, then you go to the bottom of the list."

While the union official, Lawrenson, testified positively that this was "a downright misstatement," Lawrenson's conclusion is not supported by reliable, probative, and substantial evidence. The letter is shown to be squarely correct by the written union contract, which provides that replacements "shall be hired through the offices of the Union, as vacancies occur." Lawrenson's testimony so far from being uncontradicted, as found by the examiner, was contradicted not only by the written union contract, but by Lawrenson himself. The examiner found: ". . . it is the policy of the Union to allow promotions of qualified seamen under the circumstances indicated in the letter." Lawrenson's testimony contradicts this finding. He was asked whether a wheelsman on the Steamer F. B. Morse, who wanted to shift to the Steamer A. B. Widener to follow a mate who had been promoted, could do that under the union system. Lawrenson answered: "We have no provision, because we never came across those situations. We have no provisions in the shipping rules that if a man wants to follow a certain mate he may do so." He then went on to say that it might be arranged if the man at the top of the list was willing. He was further questioned as follows:

"Q. . . . You say you are quite sure that might be arranged. But that isn't the rule, is it, if there is a vacancy, and the man on the Morse, who is not on your list wants to go to the Widener, because the mate is there, you couldn't let him go there because that would deprive the top



man on your list from having a job; wouldn't it? A. It would not, because there is a vacancy—

"Q. Now, if the top man on the list wanted the Widener job, and not the Morse, you would give him the Widener job; wouldn't you? A. Definitely."

Three witnesses testified, and no positive testimony to the contrary appears, that at the meeting of its captains and chief engineers in Cleveland, in March, 1944, just before the opening of navigation, the petitioner unequivocally instructed its officers that they must maintain strict impartiality and not interfere with union activities as long as such activities did not conflict with discipline or proper operation. In a letter addressed to the captains on May 31, the captains were instructed that "There must be no partiality." The examiner concluded that the fact that instructions were given to the supervisors to insure a fair election did not absolve petitioner of liability since the instructions "were never communicated to the employees," and this conclusion was upheld by the Board. This was error as a matter of law. Through individual letters the company instructed the men positively as to their rights. It was under no obligation to send the men copies of its instructions to the masters. When the company wrote the men, "It is your privilege to make up your own mind as to how you should vote," and "No one must threaten you in this election," it fully communicated its attitude, and in effect offered its protection.

Moreover, the instructions were acted upon. We have here a case involving 73 ships with 2,000 unlicensed employees and 596 supervisors. Complaint is made as to occurrences on only seven ships. The seven principal witnesses who attack petitioner's conduct on these ships are all union organizers, certainly not disinterested witnesses. Only four unlicensed men, non-organizers, appeared for the Board as supporting witnesses. No complaint whatever has been made as to some 540 supervisors on 66 ships.

The Board contends that these facts are immaterial. While coercive acts actually performed even on one ship would render the employer liable on this record, the background is significant in favor of the employer. Not only is there a total failure to bring home to the management knowledge of the controversies on the few ships involved, but the positive acts of management establish absence of general coercive intent.

...  
We think that to ignore the complete absence of union trouble on 66 ships where the positive instructions were that the rights of the men should be protected and where the basis of the holding against the employer is that it engaged in a general course of anti-union conduct, is to ignore the mandate of the two statutes that decision shall be based upon "the record considered as a whole."

## IV

## 340 U. S. 498, 95 L. Ed. 479, 71 S. Ct. 453 (1951)

Since the court below had originally found that the Board's order was vitiated by the examiner's bias, we must take care that the court has not been influenced by that feeling, however unconsciously, on reconsidering the record now legally freed from such imputation. Consideration of the opinion below in light of a careful reading of the entire record convinces us that the momentum of its prior decision did not enter into the decision now under review. The opinion was written by a different judge, and the court was differently constituted. The new member was a judge well versed in matters of industrial relations and not likely to be unsympathetic with such findings as were here made by the Board. The court painstakingly reviewed the record and unanimously concluded that the inferences on which the Board's findings were based were so overborne by evidence calling for contrary inferences that the findings of the Board could not, on the consideration of the whole record, be deemed to be supported by "substantial" evidence.

Were we called upon to pass on the Board's conclusions in the first instance or to make an independent review of the review by the Court of Appeals, we might well support the Board's conclusion and reject that of the court below. But Congress has charged the Courts of Appeals and not this Court with the normal and primary responsibility for granting or denying enforcement of Labor Board orders. "The jurisdiction of the court [of appeals] shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review . . . by the Supreme Court of the United States upon writ of certiorari . . ." Taft-Hartley Act, § 10(e), 61 Stat. 148, 29 USC (Supp. III) § 160(e). Certiorari is granted only "in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal." *Layne & Bowler Corp. v. Western Well Works*, 261 U. S. 387, 393; Revised Rules of the Supreme Court of the United States, Rule 38 (5). The same considerations that should lead us to leave undisturbed, by denying certiorari, decisions of Courts of Appeals involving solely a fair assessment of a record on the issue of unsubstantiality, ought to lead us to do no more than decide that there was such a fair assessment when the case is here, as this is, on other legal issues.

This is not the place to review a conflict of evidence nor to reverse a Court of Appeals because were we in its place we would find the record tilting one way rather than the other, though fair-minded judges could find it tilting either way. It is not for us to invite review by this Court of decisions turning solely on evaluation of testimony where on a con-

scientious consideration of the entire record a Court of Appeals under the new dispensation finds the Board's order unsubstantiated. In such situations we should "adhere to the usual rule of non-interference where conclusions of Circuit Courts of Appeals depend on appreciation of circumstances which admit of different interpretations." *Federal Trade Commission v. American Tobacco Co.*, 274 U. S. 543, 544, 71 L. Ed. 1193, 47 S. Ct. 663.

**Recommendation of Hoover Commission Task Force on Legal Services and Procedure, 1955 (Report, p. 217).**

The second area in which there should be more adequate judicial review is with respect to fact issues. Upon appeal from the judgment of a United States district court, the appropriate Federal court of appeals will set aside a finding of fact which is clearly erroneous under the evidence. The appellate court does not independently evaluate the evidence. Such practice would negate the importance of the trial court as the primary determiner of fact issues. But, if the appellate court is convinced from the record that a finding of fact is clearly erroneous under the evidence, it will set that finding aside.

Substantially the same scope of review of administrative fact determinations may be applied where the record upon which such determinations are based is made in substantial accordance with the rules governing the admissibility of evidence before trial courts. The task force has proposed that the rules of evidence applicable to civil nonjury cases be followed hereafter in administrative proceedings conducted by Federal agencies. The task force recommends that findings of fact, based upon formal administrative records, should be set aside if clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record.

**Discussion Problem (Hypothetical).**

William Lewis filed a charge with the N.L.R.B., asserting that his employer was threatening to close the plant if employees joined a union. A complaint was issued, and on the hearing Lewis was the principal witness. The Board found the employer not guilty. Five days later, the employer discharged Lewis.

He filed a second N.L.R.B. charge against the employer, asserting that the employer had discharged him for having filed the first charge and testified against the employer at the first hearing. If proved, this would be an illegal act on the part of the employer.

A second complaint issued. The employer filed its answer thereto, asserting that Lewis had been discharged for cause: viz., poor workmanship.

At the hearing on the second complaint, Lewis was the only witness against the employer. He testified: (1) He was not told why he was being discharged; (2) He had never been warned of poor workmanship; (3) His work was in fact as good as that of many other employees;

(4) His foreman had said to him, the day before the discharge, "We don't like people like you."

On behalf of the employer, the shop superintendent and Lewis' foreman were called as witnesses. The superintendent testified: (1) He had received written reports from the foreman on three successive months, reporting Lewis' work as unsatisfactory. [The written reports were offered in evidence as exhibits, but rejected on the grounds they constituted merely opinion evidence.] (2) He had on each occasion warned Lewis. The foreman testified: (1) Lewis was a slow worker, frequently failed to follow instructions, and scrapped more than an average amount of material; (2) When he discharged Lewis, he told him he was being fired for poor workmanship; (3) What he had really said the day before the discharge was: "We don't like people who make no effort to improve their work."

The Trial Examiner, in his recommended decision, found that Lewis was in fact discharged for cause, and that the employer was not guilty. However, when the case was reviewed by the Board, it concluded that the employer was really motivated by a desire to punish Lewis for having previously testified against the employer. It ordered that he be reinstated, with back pay. The Board's decision was based on the conclusion that the timing of the discharge—within one week after Lewis had testified against the employer at the first hearing—created a strong presumption of the employer's bad faith.

The employer appealed to the proper court of appeals to set aside the Board's order. Should the court do so?

### Section 3. Notice of Matters Not of Record

**Ohio Bell Telephone Co. v. Public Utilities Commission of Ohio, Supreme Court of the United States, 1937. 301 U. S. 292, 81 L. Ed. 1093, 57 S. Ct. 724.**

[Appeal from the Supreme Court of Ohio which had affirmed certain orders of the Ohio Public Utilities Commission. In 1921 the appellant company consolidated with the Ohio State Telephone Company, a competitor, and soon afterwards filed a schedule of new rates with the Public Utilities Commission for the unified service. Under the so-called "Pence Law," a requested increase in rates could be suspended by the Commission for 120 days, at the end of which time the rates would go into effect upon the filing of a bond for the repayment to consumers of such portion of the increased rate as the Commission upon final hearing should determine to have been excessive. Some of the new telephone schedules were made the subject of protests by telephone users and proceedings were begun to revise them.

By October, 1924, forty-three such proceedings had been begun, and on October 14, 1924, the Commission on its own motion directed a

company-wide investigation of the appellant's property and rates, and consolidated the Pence Law proceedings therewith. The Pence Law proceedings were directed at a refund of rates paid in the past, while the state-wide investigation was confined by the statutes to fixing rates for the future. The statute made it mandatory in fixing rates for the future that the Commission ascertain the value of the property as "of a date certain" to be named. The Commission adopted for that purpose the date of June 30, 1925.

The Commission required the company to file inventories of its property. A long investigation followed, the evidence being directed in the main to the value of the property on the basis of historical cost and cost of reproduction, and to the deductions chargeable to gross revenues for depreciation reserves and operating expenses generally. On January 10, 1931, the Commission announced its tentative conclusion that the valuation as of June 30, 1925, was \$104,282,735 for all the property within the state. Protests were filed both by the company and the state and municipalities, and thereafter an extended series of new hearings followed, lasting nearly three years.]

CARDOZO, J. . . . On January 16, 1934, the Commission made its findings and order setting forth what purports to be a final valuation. The intrastate property as of June 30, 1925, was valued at \$93,707,488; the total property, interstate and intrastate, at \$96,422,276.

The Commission did not confine itself, however, to a valuation of the property as of the date certain. It undertook also to fix a valuation for each of the years 1926 to 1933 inclusive. For this purpose it took judicial notice of price trends during those years, modifying the value which it had found as of the date certain by the percentage of decline or rise applicable to the years thereafter. The first warning that it would do this came in 1934 with the filing of its report. "The trend of land valuation was ascertained," according to the findings, "from examination of the tax value in communities where the company had its largest real estate holdings." "For building trends resort was had to price indices of the Engineering News Record, a recognized magazine in the field of engineering construction." "Labor trends were developed from the same sources." Reference was made also to the findings of a federal court in Illinois (*Illinois Bell Telephone Co. v. Gilbert* [D. C.] 3 F. Supp. 595, 603) as to the price levels upon sales of apparatus and equipment by Western Electric, an affiliated corporation. The findings were not in evidence, though much of the testimony and exhibits on which they rested had been received by stipulation for certain limited purposes, and mainly to discover whether the prices paid to the affiliate were swollen beyond reason. Cf. *Dayton Power & Light Co. v. Public Utilities Commission of Ohio*, 292 U. S. 290, 295, 54 S. Ct. 647, 650, 78 L. Ed. 1267. The Commission consulted these findings as indicative of market trends and leaned upon them heavily. By resort

to these and cognate sources, the value at the beginning of 1926 was fixed at 98.73% of the value at the date certain; the 1927 value at 95.7%; the 1928 value at 95%; the 1929 value at 96.3%; the 1930 value at 92.2%; the 1931 value at 86.6%; the 1932 value at 76.8%; the 1933 value at 79.1%. Upon that basis the company was found to have been in receipt of excess earnings of \$13,289,172, distributed as follows: for 1925, \$1,822,647; for 1926, \$2,041,483; for 1927, \$1,986,610; for 1928, \$1,925,301; for 1929, \$1,463,347; for 1930, \$1,481,689; for 1931, \$1,659,760; for 1932, \$908,335; for 1933, nothing. The excess was arrived at by figuring a return of 7% upon the value as a reasonable rate for the years 1925 to 1929, inclusive; 6.5% for the years 1930 and 1931; and 5.5% for the years 1932 and 1933. There being no excess revenue for the year 1933, the last year covered by the report, the Commission did not fix any percentage of reduction for the rates in future years. It did, however, prescribe a refund of the full amount of the excess for the years in which excess earnings were found to have been realized. The statewide proceeding to fix rates for the future on the basis of a date certain was thus transformed finally into a refund proceeding, similar in function to proceedings under the Pence Law for the refund of charges collected under bonds. The report of the Commission determining the excess was signed by a majority of the members, the Chairman dissenting. It was accompanied by an order similar in tenor.

The company protested and moved for a rehearing. In its protest it stated that the trend percentage accepted in the findings as marking a decline in values did not come from any official sources which the Commission had the right to notice judicially; that they had not been introduced in evidence; that the company had not been given an opportunity to explain or rebut them; and that by their use the Commission had denied a fair hearing in contravention of the requirements of the Fourteenth Amendment. Demand was made that an opportunity be conceded for explanation and rebuttal; demand was made also that the company be permitted to submit evidence showing separately for each year the fair value of its property, its revenues, expenses and net income in each of the several cases wherein rates had been collected under bond. This last was a renewal of a demand which had been made several times in the course of the inquiry, as the Commission in its report concedes. By order dated March 1, 1934, the protests were overruled, and the demands rejected.

The outcome of these maneuvers was the filing of a final order, dated September 6, 1934.

. . . Petitions in error were filed with the Supreme Court of Ohio to review the final order. . . . There was timely and adequate assertion of the infringement of petitioner's rights under the Fourteenth Amendment. The Supreme Court of Ohio affirmed with an opinion per curiam . . . . The case is here upon appeal. . . .

First. The fundamentals of a trial were denied to the appellant when rates previously collected were ordered to be refunded upon the strength of evidential facts not spread upon the record.

The Commission had given notice that the value of the property would be fixed as of a date certain. Evidence directed to the value at that time had been laid before the triers of the facts in thousands of printed pages. To make the picture more complete, evidence had been given as to the value at cost of additions and retirements. Without warning or even the hint of warning that the case would be considered or determined upon any other basis than the evidence submitted, the Commission cut down the values for the years after the date certain upon the strength of information secretly collected and never yet disclosed. The company protested. It asked disclosure of the documents indicative of price trends, and an opportunity to examine them, to analyze them, to explain and to rebut them. The response was a curt refusal. Upon the strength of these unknown documents refunds have been ordered for sums mounting into millions, the Commission reporting its conclusion, but not the underlying proofs. The putative debtor does not know the proofs today. This is not the fair hearing essential to due process. It is condemnation without trial.

An attempt was made by the Commission and again by the state court to uphold this decision without evidence as an instance of judicial notice. Indeed, decisions of this court were cited. (*Atchison, Topeka & Santa Fe Ry. Co. v. United States*, 284 U. S. 248, 260, 52 S. Ct. 146, 149, 76 L. Ed. 273; *Dayton Power & Light Co. v. Public Utilities Commission of Ohio*, supra, 292 U. S. 290, at page 311, 54 S. Ct. 647, 657, 78 L. Ed. 1267; *Central Kentucky Natural Gas Co. v. Railroad Commission of Kentucky*, 290 U. S. 264, 274, 275, 54 S. Ct. 154, 158, 78 L. Ed. 307) as giving support to the new doctrine that the values of land and labor and buildings and equipment, with all their yearly fluctuations, no longer call for evidence. Our opinions have been much misread if they have been thought to point that way. Courts take judicial notice of matters of common knowledge. 5 Wigmore, *Evidence* §§ 2571, 2580, 2583; Thayer, *Preliminary Treatise on Evidence*, pp. 277, 302. They take judicial notice that there has been a depression, and that a decline of market values is one of its concomitants. *Atchison, Topeka & Santa Fe Ry. Co. v. United States*, supra; *Dayton Power & Light Co. v. Public Utilities Commission of Ohio*, supra; *Central Kentucky Natural Gas Co. v. Railroad Commission of Kentucky*, supra. How great the decline has been for this industry or that, for one material or another, in this year or the next, can be known only to the experts, who may even differ among themselves. For illustration, a court takes judicial notice of the fact that Confederate money depreciated in value during the war between the states (*Wood v. Cooper*, 2 Heisk. [Tenn.] 441, 447; *Hix v. Hix*, 25 W. Va. 481, 484, 485), but not of the extent of the depreciation

at a given time and place. *Modawell v. Holmes*, 40 Ala. 391, 405. Cf. *Feemster v. Ringo*, 5 T. B. Mon. (Ky.) 336, 337; *Baxter v. McDonnell*, 155 N. Y. 83, 93, 49 N. E. 667, 40 L. R. A. 670. The distinction is the more important in cases where as here the extent of the fluctuations is not collaterally involved but is the very point in issue. Moreover, notice, even when taken, has no other effect than to relieve one of the parties to a controversy of the burden of resorting to the usual forms of evidence. *Wigmore, Evidence*, § 2567; 1 *Greenleaf, Evidence* (16th Ed.) p. 18. "It does not mean that the opponent is prevented from disputing the matter by evidence if he believes it disputable." *Ibid.* Cf. *Shapleigh v. Mier* (Jan. 4, 1937) 299 U. S. 466, 57 S. Ct. 261, 81 L. Ed. 355. Such at least is the general rule, to be adhered to in the absence of exceptional conditions. Here the contention would be futile that the precise amount of the decline in values was so determinate or notorious in each and every year between 1925 and 1933 as to be beyond the range of question. So much is indeed conceded on the face of the report itself. No rational concept of notoriety will include these variable elements. True, the category is not a closed one. "The precedents of former judges, in declining to notice or assenting to notice specific facts, do not restrict the present judge from noticing a new fact, provided only that the new fact is notorious to the community." 5 *Wigmore, Evidence*, § 2583. Even so, to press the doctrine of judicial notice to the extent attempted in this case and to do that retroactively after the case had been submitted, would be to turn the doctrine into a pretext for dispensing with a trial.

What was done by the Commission is subject, however, to an objection even deeper. Cf. *Brown v. New Jersey*, 175 U. S. 172, 174, 175, 20 S. Ct. 77, 44 L. Ed. 119; *West v. Louisiana*, 194 U. S. 258, 262, 263, 24 S. Ct. 650, 48 L. Ed. 965. There has been more than an expansion of the concept of notoriety beyond reasonable limits. From the standpoint of due process—the protection of the individual against arbitrary action—a deeper vice is this, that even now we do not know the particular or evidential facts of which the Commission took judicial notice and on which it rested its conclusion. Not only are the facts unknown; there is no way to find them out. When price lists or trade journals or even government reports are put in evidence upon a trial, the party against whom they are offered may see the evidence or hear it and parry its effect. Even if they are copied in the findings without preliminary proof, there is at least an opportunity in connection with a judicial review of the decision to challenge the deductions made from them. The opportunity is excluded here. The Commission, withholding from the record the evidential facts that it has gathered here and there, contents itself with saying that in gathering them it went to journals and tax lists, as if a judge were to tell us, "I looked at the statistics in the



Library of Congress and they teach me thus and so." This will never do if hearings and appeals are to be more than empty forms.

We have pointed out elsewhere that under the statutes of Ohio no provision is made for a review of the order of the Commission by a separate or independent suit. *West Ohio Gas Co. v. Public Utilities Commission* (No. 1), 294 U. S. 63, 68, 55 S. Ct. 316, 319, 79 L. Ed. 761. A different question would be here if such a suit could be maintained with an intermediate suspension of the administrative ruling. *Porter v. Investors' Syndicate*, 286 U. S. 461, 470, 471, 52 S. Ct. 617, 620, 76 L. Ed. 1226; *United States v. Illinois Central R. R. Co.*, 291 U. S. 457, 463, 54 S. Ct. 471, 473, 78 L. Ed. 909; *Nickey v. Mississippi*, 292 U. S. 393, 396, 54 S. Ct. 743, 744, 78 L. Ed. 1323; *Wells Fargo & Co. v. Nevada*, 248 U. S. 165, 168, 39 S. Ct. 62, 63 L. Ed. 190. Cf. *Norwegian Nitrogen Co. v. United States*, 288 U. S. 294, 318, 319, 53 S. Ct. 350, 359, 77 L. Ed. 796. In Ohio the sole method of review is by petition in error to the Supreme Court of the State, which considers both the law and the facts upon the record made below, and not upon new evidence. In such circumstances judicial review would be no longer a reality if the practice followed in this case were to receive the stamp of regularity. To put the problem more concretely: how was it possible for the appellate court to review the law and the facts and intelligently decide that the findings of the Commission were supported by the evidence when the evidence that it approved was unknown and unknowable? In expressing that approval the court did not mean that traveling beyond the record, it had consulted price lists for itself and had reached its own conclusion as to the percentage of decline in value from 1925 onwards. It did not even mean that it had looked at the particular lists made use of by the Commission, for no one knows what they were in any precise or certain way. Nowhere in the opinion is there even the hint of such a search. What the Supreme Court of Ohio did was to take the word of the Commission as to the outcome of a secret investigation, and let it go at that. "A hearing is not judicial, at least in any adequate sense, unless the evidence can be known." *West Ohio Gas Co. v. Public Utilities Commission* (No. 1), *supra*, 294 U. S. 63, at page 69, 55 S. Ct. 316, 319, 79 L. Ed. 761. Cf. *Interstate Commerce Commission v. Louisville & N. Ry. Co.*, 227 U. S. 88, 91, 33 S. Ct. 185, 57 L. Ed. 431; *United States v. Abilene & Southern Ry. Co.*, 265 U. S. 274, 288, 44 S. Ct. 565, 569, 68 L. Ed. 1016; *Chicago Junction Case*, 264 U. S. 258, 263, 264, 265, 44 S. Ct. 317, 318, 319, 68 L. Ed. 667.

Regulatory commissions have been invested with broad powers within the sphere of duty assigned to them by law. Even in quasi-judicial proceedings their informal and expert judgment exacts and receives a proper deference from courts when it has been reached with due submission to constitutional restraints. *West Ohio Gas Co. v. Public Utili-*

ties Commission (No. 1), *supra*, 294 U. S. 63, at page 70, 55 S. Ct. 316, 320, 79 L. Ed. 761; *West Ohio Co. v. Public Utilities Commission* (No. 2), 294 U. S. 79, 55 S. Ct. 324, 79 L. Ed. 773; *Los Angeles Gas & Electric Corporation v. Railroad Commission of California*, 289 U. S. 287, 304, 53 S. Ct. 637, 643, 77 L. Ed. 1180. Indeed, much that they do within the realm of administrative discretion is exempt from supervision if those restraints have been obeyed. All the more insistent is the need, when power has been bestowed so freely, that the "inexorable safeguard" (*St. Joseph Stock Yards Co. v. United States*, 298 U. S. 38, 73, 56 S. Ct. 720, 735, 80 L. Ed. 1033) of a fair and open hearing be maintained in its integrity. *Morgan v. United States*, 298 U. S. 468, 480, 481, 56 S. Ct. 906, 911, 80 L. Ed. 1288; *Interstate Commerce Commission v. Louisville & N. Ry. Co.*, *supra*. The right to such a hearing is one of "the rudiments of fair play" (*Chicago, M. & St. P. Ry. Co. v. Polt*, 232 U. S. 165, 168, 34 S. Ct. 301, 58 L. Ed. 554) assured to every litigant by the Fourteenth Amendment as a minimal requirement. *West Ohio Gas Co. v. Public Utilities Commission* (No. 1), (No. 2), *supra*; *Brinkerhoff-Faris Co. v. Hill*, 281 U. S. 673, 682, 50 S. Ct. 451, 454, 74 L. Ed. 1107. Cf. *Norwegian Nitrogen Co. v. United States*, *supra*. There can be no compromise on the footing of convenience or expediency, or because of a natural desire to be rid of harassing delay, when that minimal requirement has been neglected or ignored.

In an endeavor to sustain the judgment the state shifts its line of argument from the course pursued below, so far, at least, as the course then followed is reflected in the record. Both the Commission and the Supreme Court of Ohio tell us that they have applied the price trends to the value on the day certain by resort to judicial notice. The state now suggests that whatever the court or the Commission may have professed to be doing, there was a basis in the evidence for the conclusion ultimately reached. To give aid to that suggestion reference is made to the findings of a federal court as to the prices charged by Western Electric for telephone equipment, which findings were not in evidence, though they were founded upon evidence received by stipulation for purposes narrowly defined and exclusive of any others. The terms of the stipulation have already been stated in this opinion. Even if we assume in favor of the state that the evidence, when in, could be considered as indicative of the trend of market values generally, the judgment is not helped. The Commission did not take the prices paid by appellant to the affiliated corporation as the only evidence of market trends, but merely as one factor along with many others. What weighting it gave them the record does not disclose, and the Commission denied the appellant an opportunity to inquire. According to appellant's computation, telephone apparatus and equipment make up less than 30% of the value of appellant's plant. Even for that portion of the plant, the Western

Electric prices were not accepted as decisive, but were supplemented and corrected from sources dehors the record. For the other 70%, they were without probative significance, at all events until supplemented by evidence that the decline in the value of apparatus and equipment was less than that in the value of land or buildings or other components of the plant. To fix the value of these components the Commission had recourse to statistics which it collected for itself. There was no "suitable opportunity through evidence and argument . . . to challenge the result." *West Ohio Gas Co. v. Public Utilities Commission* (No. 1), supra, 294 U. S. 63, at page 70, 55 S. Ct. 316, 320, 79 L. Ed. 761.

The decree is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Ordered accordingly.

Reversed and remanded.<sup>30</sup>

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<sup>30</sup> In *Market Street Ry. Co. v. Railroad Commission of California*, 324 U. S. 548, 89 L. Ed. 1171, 65 S. Ct. 770 (1945), it was urged, relying upon the *Ohio Bell Telephone* case, that the Commission's order was invalid under the due process clause because it was based on matters outside the record. It appeared that the Commission had, in reaching its decision, taken advantage of the monthly reports submitted by the company, making use of them to determine the operating revenues for the period from January to August, 1943, then comparing those revenues with the operating revenues for the same period of the preceding year. The Commission concluded that the current revenues had increased twenty percent over those of the preceding year. This action was challenged on the ground that the current reports had not been introduced in evidence and they were not in the record. The Commission admitted the fact, but contended that even if error had been committed in making use of such reports, the error was harmless since there was other evidence in the record to support the Commission's conclusion. The Company did not contend that the information derived from the reports was erroneous or that it could have been disproved or explained in any way. In short, no prejudice was shown. Under such circumstances the court declined to hold that due process had been denied the company. The court said:

"Due process, of course, requires that commissions proceed upon matters in evidence to the test of cross-examination and rebuttal. But due process deals with matters of substance and is not to be trivialized by formal objections that have no substantial bearing on the ultimate rights of parties. The process of keeping informed as to regulated utilities is a continuous matter with commissions. We are unwilling to say that such an incidental reference as we have here to a party's own reports, although not formally marked in evidence in the proceeding, in the absence of any showing of error or prejudice constitutes a want of due process."

In *United States v. Abilene & S. Ry. Co.*, 265 U. S. 274, 68 L. Ed. 1016, 44 S. Ct. 565 (1924), the plaintiffs contended, among other things, that the order was void because it rested upon evidence not legally before the commission, namely, upon data taken from the annual reports filed with the commission by the plaintiff as prescribed by law. These reports were not formally introduced as evidence, and the commission conceded that it had made use of them in disposing of the case. Holding the order void for this reason, the court, Mr. Justice Brandeis speaking, said, "A finding without evidence is beyond the power of the commission. Papers in the commission's files are not always evidence in a

**Olympia Waterworks v. Gelbach**, Supreme Court of Washington, 1897. 16 Wash. 482, 48 Pac. 251.

SCOTT, C. J. The plaintiff was the owner of certain water mains, pipes, engines, boilers, etc., as a part of its water system in the city of Olympia, at all times during 1895, and since. In that year said property was assessed as personal property by the county assessor at \$16,000. The county board of equalization notified the plaintiff to appear and show cause why such assessment should not be increased to \$60,000. Plaintiff appeared before said board, submitted evidence and protested against any raise. Thereupon the board raised the assessment to \$31,650, upon which amount public taxes were subsequently levied for that year. Plaintiff has paid such portion of said taxes as would be due upon an assessment of \$16,000, but has refused to pay more, and brings this action to enjoin the county treasurer from distraining and selling its property to make the balance of said taxes, claiming that the action of the board of equalization was unwarranted

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case. *New England Divisions Case*, 261 U. S. 184, 198, note 19. Nothing can be treated as evidence which is not introduced as such. *Interstate Commerce Commission v. Louisville & N. R. Co.*, 227 U. S. 88; *Chicago Junction Case*, 264 U. S. 258. . . . The objection to the use of the data contained in the annual reports is not lack of authenticity or untrustworthiness. It is that the carriers were left without notice of the evidence with which they were, in fact, confronted, as later disclosed by the finding made. The requirement that in adversary proceeding specific reference be made, is essential to the preservation of the substantial rights of the parties."

Compare with the federal rule, the decision in *Chicago & N. W. Ry. Co. v. Railroad Commission of Wisconsin*, 156 Wis. 47, 145 N. W. 216, 974 (1914), commented on in 27 Harv. L. Rev. 683 (1914), in which case the court took judicial notice of annual reports filed by the various carriers, and used the information therein contained as to costs of other carriers in fixing a rate for the *Chicago & N. W. Ry. Company*. See also *James Walsh's Case*, 227 Mass. 341, 116 N. E. 496 (1917), permitting the Industrial Accident Board to take judicial notice of the earnings of ordinary labor.

Section 18 of the New York Public Service Law provides that "Whenever the public service commission shall deem it necessary in order to carry out its statutory duties to investigate . . . any public utility, such public utility shall be charged with and pay such portion of the compensation and expenses of the commission . . . as is reasonably attributable to such investigation." Must the commission's decision to investigate be based upon evidence introduced into the record at a hearing? *Bronx Gas & Electric Co. v. Maltbie*, 268 N. Y. 278, 197 N. E. 281 (1935).

For a thorough and complete discussion of the subject matter of the last three cases see Gellhorn, "Official Notice in Administrative Adjudication," 20 Tex. L. Rev. 131 (1941), and Brown, "Public Service Commission Procedure—A Problem and a Suggestion," 87 U. of Pa. L. Rev. 139 (1938).

For a brief resume of the principles related to administrative hearings as evolved in the more recent Supreme Court Decisions, see an article by Cooper, "Official Notice by Administrative Agencies as Substitute for Evidence," 29 Mich. St. B. J. 25 (1950).

and the tax consequently void. The defendants interposed a demurrer upon two grounds: (1) That the court had no jurisdiction of the subject matter; (2) that the complaint did not state facts sufficient to constitute a cause of action. The demurrer was overruled, and, defendants decline to plead further, judgment was entered for plaintiff as prayed for, and the defendants have appealed.

In a case heretofore decided by this court between the same parties (14 Wash. 268, 44 Pac. 267), brought for the purpose of reducing a previous assessment of the same property, it was held by a majority of the court that the action of the board of equalization was final and that no appeal would lie therefrom. The claim in the present case is based upon alleged fraudulent proceedings upon the part of the board. The complaint contains several allegations of fraud in general terms, but they are all based upon the act of the board in raising the assessment. It appears that after the notice was given, the board heard all of the testimony offered by the plaintiff, and, although all of this testimony showed that the property was of less value than that placed thereon by the assessor, and there was no conflicting evidence, the board saw fit to raise it, and it is contended that the board had no authority to do this.

But it seems to us that the board was entitled to rely, in a measure, upon their own knowledge and judgment as to the value of the property, and were not bound by the testimony offered, nor to keep within the values placed thereon by the witnesses. After hearing all of the testimony, it was the duty of the board to place such a value upon the property as they believed to be its just and true value, as compared with the other property in the county. While the complaint contains the general allegation that the assessed value was increased with the intent to oppress and defraud the plaintiff, and while the general rule is that, upon demurrer, the allegations of the complaint are to be taken as true, yet it is evident that they must be reasonably interpreted, and the special allegations are controlled in a measure by the whole case presented; and it appears beyond controversy that, if there was any fraud in the premises, it consisted only in placing too high a valuation upon the property, not that the plaintiff was deprived of a hearing, or that the board refused to inform itself; and the complaint also contains the allegation that the members of the board at all times claimed and insisted that there was no intent to defraud, but that plaintiff's assessment as equalized was equal and uniform as compared with all other property in said county.

It is a well known fact that there is often a wide difference of opinion as to the values of property among persons acting honestly and endeavoring to get at the true value, and as this question must be settled somewhere, the law has reposed it in the board of equalization, and made their action final. The holding of the court in the former

case that no appeal would lie, and that it was the intention of the law that the action of the board should be final, practically deprives the plaintiff of any remedy, so far as the particular act of valuing the property is concerned. It would be a useless purpose of the law to deprive parties of the right to appeal, to the end that the action of the board in such matters should be final, if the same parties have a right to institute an independent action to try the very matter which would be involved in the appeal. The allegation that the board acted fraudulently can give the case no better standing, when the only fraud alleged goes to the valuation placed by the board upon the property. It may be that there can be such action on the part of the board, fraudulent or otherwise, such as refusing to hear testimony or depriving plaintiff of notice, etc., as would warrant the interference of the courts in some manner. But there can be none where the sole question presented is whether or not the board acted under an honest belief in placing a value upon the property, for this is a matter that would not be susceptible of proof. The fact that they placed a higher valuation upon the property than the witnesses placed upon it would not be conclusive evidence, unless perchance such an excessive value is fixed that fraud must be conclusively presumed. . . .

Reversed.<sup>31</sup>

### Statutory Provisions

Section 7 (d) of the Federal Administrative Procedure Act provides in part: "Where any agency decision rests on official notice of a material fact not appearing in the evidence in the record, any party shall on timely request be afforded an opportunity to show the contrary."

The Hoover Commission Task Force on Legal Services and Procedures (Report, p. 200—1955) comments:

Related to the problem of evidence is the matter of official notice of facts outside the administrative record. Most agencies consider matters so noticed. But they do not all follow uniform procedures with respect thereto. The Interstate Commerce Commission designates the matters of which official notice will be taken and affords opportunity to the parties to controvert them. The Securities and Exchange Commission states in its opinion or order the facts which have been officially noticed and thereafter affords the parties a rehearing on such matters, if requested.

Under section 7 (d) of the Administrative Procedure Act, 5 USC § 1006 (d) (1952), where any agency decision rests on official notice of a material fact not appearing in the evidence in the record, on timely

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<sup>31</sup> In *Halpern v. Andrews* (D. C. Pa., 1927), 21 F. (2d) 969, it was held that the prohibition commissioner might act on the basis of knowledge obtained outside the record in denying a permit to withdraw alcohol from storage for alleged legitimate commercial purposes, the surrounding circumstances indicating the likelihood of use for bootleg liquor. See Faris, "Judicial Notice by Administrative Bodies," 4 Ind. L. Jour. 167 (1928).

request any party can be afforded an opportunity to show the contrary. This statutory provision does not adequately protect a private party from having an agency take official notice of information contained in agency records, otherwise confidential. Nor does it affect the authority of presiding officers to take judicial notice of facts of common knowledge.

The official notice provisions of the Administrative Procedure Act should be improved. Where a decision includes official notice of a material fact beyond the evidence appearing in the record, the decision should be without force or effect unless (1) the fact so noticed is specified in the record or is brought to the attention of the parties before decision, and (2) every party adversely affected by the decision is afforded an opportunity to controvert the fact so noticed. This limitation, of course, should not affect the application of the doctrine of judicial notice by presiding officers in appropriate circumstances.

Compare the provisions of Section 9 (4) of the Model State Administrative Procedure Act:

Agencies may take notice of judicially cognizable facts and in addition may take notice of general, technical, or scientific facts within their specialized knowledge. Parties shall be notified either before or during hearing, or by reference in preliminary reports or otherwise, of the material so noticed, and they shall be afforded an opportunity to contest the facts so noticed. Agencies may utilize their experience, technical competence, and specialized knowledge in the evaluation of the evidence presented to them.

In Cooper, *Administrative Agencies and the Courts* (U. of Mich. Press, 1951), p. 206, it is suggested: "The rule is now clearly emerging . . . that an administrative agency may take official notice not only of such factual matters as courts judicially notice, but also of any factual matter of a general nature which its experience has shown to be true, subject always to the proviso that the parties must be given adequate advance notice of the facts which the agency proposes to note, and given adequate opportunity to show the inaccuracy of the facts or the fallacy of the conclusions which the agency proposes tentatively to accept without proof. . . . there are two limitations imposed on the power of administrative agencies to notice officially as facts certain generalities which their special experience has taught them to believe. They are: (1) The facts noticed must be incorporated into the record, or there must be a citation of the source material on which the agency relies; and (2) this source material must be made available to the parties for their examination."

## CHAPTER VI

### RULES AND ORDERS AND THEIR ENFORCEMENT

#### SECTION 1. PUBLICATION OF ADMINISTRATIVE RULES

##### The Federal Register Act

In this country we have been laggard in making provision for the prompt and systematic publication of administrative rules. In England as long ago as 1890, first under treasury orders and subsequently under the Rules Publication Act of 1893 (56 & 57 Vict. c. 66), all administrative rules of a general nature were required to be published systematically as soon as issued in separate leaflet form, and annually they were collected into bound and indexed volumes. Most of the British colonies and dominions have followed the English example. Similar publications have long been common on the continent. But in the United States it was not until the National Recovery Administration and the numerous other New Deal agencies released a veritable flood of administrative rules upon a public somewhat sensitive to governmental interference with so-called private affairs that the United States Congress finally made provision for the prompt and systematic publication of federal administrative rules. On July 26, 1935, the "Federal Register Act" was approved, and on March 14, 1936, the first issue of the daily Federal Register came from the press.<sup>1</sup> The scope and

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<sup>1</sup> In explanation of the need for a Federal Register, see Griswold, "Government in Ignorance of Law—A Plea for Better Publication of Executive Legislation," 48 Harv. L. Rev. 198 (1934). As to the act and the publication itself, see 49 Harv. L. Rev. 1209 (1936); 4 Geo. Wash. L. Rev. 268 (1936); 31 Ill. L. Rev. 357 (1936).

Regarding the need of proper reporting of federal administrative rules and regulations, the American Bar Association's Special Committee on Administrative Law, 59 A. B. A. Rep., pp. 552-555 (1934), has expressed itself as follows. While the report is outdated, it is still valuable as showing the problem which the legislation was designed to meet:

"3. *Reforms of Existing Administrative Machinery.* . . . A few words should be devoted to the imperative necessity for making the rules, regulations and other exercises of legislative power by federal administrative agencies available at some central office and (with appropriate provisions for emergency cases) to subject them to reasonable requirements by way of registration and publication as prerequisite to their going into force and effect.



legal effect of the publication are best determined by examining the act itself which follows:

"The public generally, and most lawyers, do not realize how great is the flood of administrative legislation which is daily poured forth by federal agencies, particularly since March 4, 1933. No one, so far as the committee knows, has attempted to collect these enactments or even to list them or to calculate their volume, until the committee itself undertook the task. Practically every agency to which legislative power has been delegated (or sub-delegated) has exercised it, and has published its enactments, sometimes in the form of official printed pamphlets, bound or looseleaf, sometimes in mimeograph form, sometimes in privately owned publications, and sometimes in press releases. Sometimes they exist only in sort of an unwritten law. Rules and regulations, upon compliance with which important privileges and freedom from heavy penalties may depend, are amended and interpreted as formally or informally as they were originally adopted.

"The examples furnished by the President's Executive Orders and by the National Recovery Administration will serve to illustrate the formidable output of administrative legislation during the past 15 months. The directing of attention to these examples is not to be understood as an expression of disapproval of the substantive features either of the statute or of the Executive Orders. As is stated earlier in this report, the committee is concerning itself only with what it deems defects in federal administrative machinery. These specific examples have been chosen because they furnish the most striking evidence of tendencies which are exhibited to a greater or lesser degree in most federal administrative agencies, whether established before or after March 4, 1933.

"From March 4, 1933, to June 15, 1934, as nearly as can be calculated, the President approved 674 Executive Orders, aggregating approximately 1400 pages, of which many are a combination of several parts (as high as 15) and represent a number of separate orders. The total volume is, conservatively estimated, greater than the total of the preceding four year period from March 1, 1929 to March 4, 1933, during which 1004 orders were approved, most of them not having an important legislative character. Nearly six times as many Executive Orders have been issued during this period of 15 months as during the period 1862-1900, and 10 percent of the total since 1862. The practice of filing Executive Orders with the Department of State is not uniformly or regularly followed, and the totals are really greater than above indicated. Some orders are retained or buried in the files of the government departments, some are confidential and are not published, and the practice as to printing and publication of orders is not uniform. Some orders are made known and available rather promptly after their approval; the publication of others may be delayed a month or more, with consequent confusion in numbering. The comparatively large number of recent orders which incorporate provisions purporting to impose criminal penalties by way of fine and imprisonment for violation is without numerical precedent in the history of the government.

"Of the recent output, approximately half have been issued under or pursuant to the National Industrial Recovery Act, and have had to do either with its administration, agencies, and appropriations, or with the approval of codes and amendments thereof.

"The total volume above stated does not include the contents of the codes and amendments, all of which according to the act, have the force and effect of law and violation of any provision of which is a criminal offense. To June 25, 1934, 485 codes and 95 supplements had been approved, averaging 10 closely printed pages to each code and supplement. Of these, approximately 226 codes

## AN ACT

To provide for the custody of federal proclamations, orders, regulations, notices, and other documents, and for the prompt and uniform printing and distribution thereof.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

Sec. 301. The Administrator of General Services, acting through a division established by him in the National Archives Establishment, hereinafter referred to as the "Division," is charged with the custody and, together with the Public Printer, with the prompt and uniform printing and distribution of the documents required or authorized to be published under section 305 of this title. There shall be at the head of the Division a director, appointed by the President, who shall act under the general direction of the Administrator of General Services in carry-

and 7 supplements were approved by Executive Orders of the President. 242 codes and 88 supplements were approved by the Administrator for Industrial Recovery, 16 codes by the Secretary of Agriculture and 1 general code by the Petroleum Administration, all under authority delegated by Executive Order. Most of the codes established "quasi-administrative" agencies, called "code authorities" under which were pyramided a whole hierarchy of countless divisional, regional and local agencies, and many of which were given a measure of legislative power. It would be impossible to calculate the volume of 'law' made by these agencies.

"To June 16, 1934 the Administrator for Industrial Recovery had issued 2998 administrative orders, approving or modifying codes, providing for exceptions and exemptions therefrom, and covering a multitude of other activities of a legislative order. Countless 'interpretations' of codes have been issued by the N. R. A. and the many code authorities, of which there is no real record or indexing, or even any trustworthy source of information. Finally, and perhaps most astounding of all, the N. R. A. has adopted numerous regulations and sets of regulations which are to be found scattered among 5991 press releases issued up to June 22, 1934, and the N. R. A. staff itself has not segregated such press releases having a legislative effect from those of an informational or news character.

"The total legislative output by, or in connection with, this one administrative agency staggers the imagination. Any calculation involves guess-work but a safe guess would be that the total exceeds 10,000 pages of 'law' in the period of one year. This figure may be compared with the total of 2735 double-column pages which comprise the total federal statute law as set forth in the Code of Laws of the United States and the cumulative supplement of 1933. When the legislative production of other federal administrative agencies is taken into account, it should not be difficult to demonstrate that the total volume of administrative legislation now in force greatly exceeds the total legislative output of Congress since 1789.

"Under these circumstances not only citizens but even lawyers are helpless in any effort to ascertain the law applicable to a given state of facts. The presumption of knowledge of the law becomes, to term it mildly, more than violent. Is it too much to expect that before these legislative enactments be given force and effect, they be subjected to simple formalities such as those suggested in the committee's conclusion?"

See Blachly and Oatman, "Federal Statutory Administrative Orders," 25 Iowa L. Rev. 582 (1940).

ing out the provisions of this chapter and the regulations prescribed hereunder, who shall receive a salary, to be fixed by the President, not to exceed \$5,000 a year.

Sec. 302. The original and two duplicate originals or certified copies of any document required or authorized to be published under section 305 of this title shall be filed with the Division, which shall be open for that purpose during all hours of the working days when the Archives Building shall be open for official business. The Administrator of General Services shall cause to be noted on the original and duplicate originals or certified copies of each document the day and hour of filing thereof: *Provided*, That when the original is issued, prescribed, or promulgated outside of the District of Columbia and certified copies are filed before the filing of the original, the notation shall be of the day and hour of filing of the certified copies. Upon such filing, at least one copy shall be immediately available for public inspection in the office of the Administrator of General Services. The original shall be retained in the archives of the National Archives Establishment and shall be available for inspection under regulations to be prescribed by the Administrator of General Services. The Division shall transmit immediately to the Government Printing Office for printing, as provided in this chapter, one duplicate original or certified copy of each document required or authorized to be published under section 305 of this title. Every Federal agency shall cause to be transmitted for filing as herein required the original and the duplicate originals or certified copies of all such documents issued, prescribed, or promulgated by the agency.

Sec. 303. All documents required or authorized to be published under section 305 of this chapter shall be printed and distributed forthwith by the Government Printing Office in a serial publication designated the "Federal Register." It shall be the duty of the Public Printer to make available the facilities of the Government Printing Office for the prompt printing and distribution of the Federal Register in the manner and at the times required in accordance with the provisions of this chapter and the regulations prescribed hereunder. The contents of the daily issues shall be indexed and shall comprise all documents, required or authorized to be published, filed with the Division up to such time of the day immediately preceding the day of distribution as shall be fixed by regulations hereunder. There shall be printed with each document a copy of the notation, required to be made under section 302, of this title of the day and hour when, upon filing with the Division, such document was made available for public inspection. Distribution shall be made by delivery or by deposit at a post office at such time in the morning of the day of distribution as shall be fixed by such regulations prescribed hereunder. The prices to be charged for the Federal Register may be fixed by the administrative committee established by section 306 of this title without reference to the restrictions placed upon and fixed for the sale of Government publications by sections 72 and 72a of this title.

Sec. 304. As used in this chapter, unless the context otherwise requires, the term "document" means any Presidential proclamation or Executive order and any order, regulation, rule, certificate, code of fair competition, license, notice, or similar instrument issued, prescribed, or promulgated by a Federal agency; the terms "Federal agency" or "agency" mean the President of the United States, or any executive

department, independent board, establishment, bureau, agency, institution, commission, or separate office of the administrative branch of the Government of the United States but not the legislative or judicial branches of the Government; and the term "person" means any individual, partnership, association, or corporation.

Sec. 305. (a) There shall be published in the Federal Register (1) all Presidential proclamations and Executive orders, except such as have no general applicability and legal effect or are effective only against Federal agencies or persons in their capacity as officers, agents, or employees thereof; (2) such documents or classes of documents as the President shall determine from time to time have general applicability and legal effect; and (3) such documents or classes of documents as may be required so to be published by Act of the Congress: *Provided*, That for the purpose of this chapter every document or order which shall prescribe a penalty shall be deemed to have general applicability and legal effect.

(b) In addition to the foregoing there shall also be published in the Federal Register such other documents or classes of documents as may be authorized to be published pursuant hereto by regulations prescribed hereunder with the approval of the President, but in no case shall comments or news items of any character whatsoever be authorized to be published in the Federal Register.

Sec. 306. There is established a permanent Administrative Committee of the Federal Register of three members consisting of the Archivist or Acting Archivist, who shall be chairman, an officer of the Department of Justice designated by the Attorney General, and the Public Printer or Acting Public Printer. The Administrator of General Services shall act as secretary of the committee. The committee shall prescribe, with the approval of the President, regulations for carrying out the provisions of this chapter. Such regulations shall provide, among other things: (a) The manner of certification of copies required to be certified under section 302 of this title, which certification may be permitted to be based upon confirmed communications from outside of the District of Columbia; (b) the documents which shall be authorized pursuant to section 305(b) of this title to be published in the Federal Register; (c) the manner and form in which the Federal Register shall be printed, reprinted, compiled, indexed, bound, and distributed; (d) the number of copies of the Federal Register which shall be printed, reprinted, and compiled, the number which shall be distributed without charge to Members of Congress, officers and employees of the United States, or any Federal agency for their official use, and the number which shall be available for distribution to the public; and (e) the prices to be charged for individual copies of, and subscriptions to, the Federal Register and reprints and bound volumes thereof.

Sec. 307. No document required under section 305(a) of this title to be published in the Federal Register shall be valid as against any person who has not had actual knowledge thereof until the duplicate originals or certified copies of the document shall have been filed with the Division and a copy made available for public inspection as provided in section 302 of this title; and, unless otherwise specifically provided by statute, such filing of any document, required or authorized to be published under section 305 of this title, shall, except in cases where notice by publication is insufficient in law, be sufficient to give notice of the contents of such document to any person subject thereto

or affected thereby. The publication in the Federal Register of any document shall create a rebuttable presumption (a) that it was duly issued, prescribed, or promulgated; (b) that it was duly filed with the Division and made available for public inspection at the day and hour stated in the printed notation; (c) that the copy contained in the Federal Register is a true copy of the original; and, (d) that all requirements of this chapter and the regulations prescribed hereunder relative to such document have been complied with. The contents of the Federal Register shall be judicially noticed and, without prejudice to any other mode of citation, may be cited by volume and page number.

Sec. 308. Whenever notice of hearing or of opportunity to be heard is required or authorized to be given by or under an Act of the Congress, or may otherwise properly be given, the notice shall be deemed to have been duly given to all persons residing within the continental United States (not including Alaska), except in cases where notice by publication is insufficient in law, if said notice shall be published in the Federal Register at such time that the period between the publication and the date fixed in such notice for the hearing or for the termination of the opportunity to be heard shall be (a) not less than the time specifically prescribed for the publication of the notice by the appropriate Act of the Congress; or (b) not less than fifteen days when no time for publication is specifically prescribed by the Act, without prejudice, however, to the effectiveness of any notice of less than fifteen days where such shorter period is reasonable.

Sec. 309. Every payment made for the Federal Register shall be covered into the Treasury as a miscellaneous receipt. The cost of printing, reprinting, wrapping, binding, and distributing the Federal Register and any other expenses incurred by the Government Printing Office in carrying out the duties placed upon it by this chapter shall be borne by the appropriations to the Government Printing Office and such appropriations are hereby made available, and are authorized to be increased by such additional sums as are necessary for such purposes, such increases to be based upon estimates submitted by the Public Printer. The purposes for which appropriations are available and are authorized to be made under section 309 of this title are enlarged to cover the additional duties placed upon the National Archives Establishment by the provisions of this chapter. Copies of the Federal Register mailed by the Government shall be entitled to the free use of the United States mails in the same manner as the official mail of the executive departments of the Government. The cost of mailing the Federal Register to officers and employees of Federal agencies in foreign countries shall be borne by the respective agencies.

Sec. 310. The provisions of section 302 of this title shall become effective sixty days after July 26, 1935, and the publication of the Federal Register shall begin within three business days thereafter: *Provided*, That the appropriations involved have been increased as required by section 309 of this chapter. The limitations upon the effectiveness of documents required, under section 305(a) of this title to be published in the Federal Register shall not be operative as to any document issued, prescribed, or promulgated prior to the date when such document is first required by this chapter or subsequent Act of the Congress or by Executive order to be published in the Federal Register.

Sec. 310(a). The provisions of section 302 of this title shall become effective thirty days after appropriations to the Government Printing

Office become available and the publication of the Federal Register shall begin within two business days thereafter.

Sec. 311. (a) The Administrative Committee of the Federal Register is authorized, with the approval of the President, to require, from time to time as it may deem necessary, the preparation and publication in special or supplemental editions of the Federal Register of complete codifications of the documents of each agency of the government which have general applicability and legal effect, which have been issued or promulgated by such agency by publication in the Federal Register or by filing with the Committee, and which are relied upon by the agency as authority for, or are invoked or used by it in the discharge of, its activities or functions, and are in force and in effect as to facts arising on or after such dates as may be specified by the Committee.

(b) Any codification published pursuant to subsection (a) of this section shall be printed and bound in permanent form. As far as practicable, each title in such codification shall constitute a separate book. Each book shall include an index thereto, and a pocket for cumulative supplements. A general index to the entire edition shall be separately printed and bound and shall be provided with a pocket for cumulative supplements.

(c) Cumulative supplements to the codifications may be published annually. Such supplements shall contain the full text of all changes and additions issued since the codification date specified by the Committee which are still in effect. Individual books, including the cumulative supplements thereto, may be collated and republished when deemed necessary by the Committee.

(d) The Federal Register Division shall prepare, index, and publish the codifications and supplements thereto including the collations as authorized by subsection (c) of this section.

(e) The codified documents of the several agencies published in the supplemental edition of the Federal Register pursuant to the provisions of this section, as amended, by documents subsequently filed with the division and published in the daily issues of the Federal Register, shall be prima facie evidence of the text of such documents and of the fact that they are in full force and effect on and after the date of publication.

(f) The Administrative Committee of the Federal Register shall prescribe, with the approval of the President, regulations for carrying out the provisions of this section.<sup>2</sup>

### Effect of Federal Register Act

Sections 305, 307, and 308 might be described as the principal operative sections of the Act. What is their effect?

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<sup>2</sup> The Federal Register Act is found in 44 USCA 301 et seq. It was originally approved July 26, 1935. The quoted text is amended to date.

In recent years many state legislatures have adopted statutes requiring and providing for the publication of administrative rules. See Moreland, "State Administrative Rules and Regulations," 21 Mich. St. B. Jour. 22 (1942).

For law review comment on the Federal Register, see Wigmore, "The Federal Register and Code of Federal Regulations; How to Use Them—If You Have Them," 29 A. B. A. Jour. 10 (1943); 22 Mich. St. B. Jour. 23 (1943); Ronald, "Publication of Federal Administrative Legislation," 7 Geo. Wash. L. Rev. 52 (1938).

Does section 305 require publication of the regulations adopted by Federal Agencies? Does this depend on whether the President has issued a formal determination that such regulations have "general applicability and legal effect?" (For help in answering these questions, consult section 3 of the Federal Administrative Procedure Act.)

Suppose an agency adopted an informal interpretative bulletin announcing criteria of decision to be followed by staff members in disposing of cases. Would publication of such a document be required?

What is the effect of sections 307 and 308? Suppose that at two o'clock one afternoon, during the period when the Office of Price Administration could fix price ceilings on retail sales of commodities, that Office had filed with the Federal Register an order imposing a price ceiling on overalls; and that the following morning the owner of a country store, without actual notice of the issuance of the price ceiling, sold a pair of overalls at a price in excess of the permitted level. Would he be subject to penalties for having violated the order?

The Act really accomplished very little in the way of compelling agencies to make known to the public the actual procedures and policies which govern the day-to-day operations of the agencies. Some of the deficiencies were pointed out in 1941 by the Attorney General's Committee on Administrative Procedure in Government Agencies.

**Rules, Regulations and Statements—Excerpt from the Final Report of the Attorney General's Committee, Pages 25-29.**

After thorough studies had been undertaken in 1933 at the direction of the President, provision was made, for the first time in the history of the United States, for the publication of administrative regulations in the manner of other laws. As a result the Federal Register now provides for the daily publication of new "rules, regulations, and orders" having "general applicability and legal effect." The Code of Federal Regulations is a codification of the same documents. While this important step made it possible for the citizens to discover what rules, if any, had been made, it did not provide affirmatively for the making of needed types of rules or for the issuance of other forms of information. Rules and regulations are not the only materials of administrative law. There are, in addition, the statutes, which are often general in their substantive provisions and sketchy in their procedural directions; the decisions of each agency, only some of which are accompanied by reasoned opinions and only some of which are published; the agencies' reports to Congress, which contain a variety of useful information but which are not always readily available to the public at large; the interpretative rulings made by the agencies or their general counsel, which frequently are not published; press releases, notices, speeches, and other statements of policy which are easily lost and obviously cannot be distributed to or kept by all who might some day have use for them; and



the decisions of the courts upon review, enforcement, or restraint of administrative action, which are few in number and deal for the most part either with purely formal matters or with the details of a particular case. All these types of information should be made available, in orderly and readily accessible form, to the public. To bring such scattered materials together, to know which are superseded, and to fill in missing chapters is a task that only the agency involved can perform.

A primary legislative need, therefore, is a definite recognition, first, of the various kinds or forms of information which ought to be available and, second, of the authority and duty of agencies to issue such information. Rules and regulations are of many kinds, each of which should be recognized in any attempt to deal with the problem. Moreover, instead of diverse methods of issuing information, as far as practicable all standard information regarding a given agency should be brought together. Without attempting to exhaust the subject, it is possible to list at least seven forms of vital administrative information:

1. *Agency organization.*—Few Federal agencies issue comprehensive or usable statements of their own internal organization—their principal offices, officers, and agents, their divisions and subdivisions; or their duties, functions, authority, and places of business. The United States Government Manual is not sufficiently detailed to fill this gap. Yet without such information, simply compiled and readily at hand, the individual is met at the threshold by the troublesome problem of discovering whom to see or where to go—a problem sometimes difficult to solve without irksome correspondence or unproductive personal consultations.

2. *Statements of general policy.*—Most agencies develop approaches to particular types of problems, which, as they become established, are generally determinative of decisions. Even when their reflection in the actual determinations of an agency has lifted them to the statute of “principles of decision,” they are rarely published as rules or regulations, though sometimes they are noted in annual reports or speeches or press releases, as well as in the opinions disposing of particular controversies. As soon as the “policies” of an agency become sufficiently articulated to serve as real guides to agency officials in their treatment of concrete problems, that fact may advantageously be brought to public attention by publication in a precise and regularized form.

3. *Interpretations.*—Most agencies find it useful from time to time to issue interpretations of the statutes under which they operate. These interpretations are ordinarily of an advisory character, indicating merely the agency’s present belief concerning the meaning of applicable statutory language. They are not binding upon those affected, for, if there is disagreement with the agency’s view, the question may be presented for determination by a court. But the agency’s interpretations are in any event of considerable importance; customarily they are



accepted as determinative by the public at large, and even if they are challenged in judicial proceedings, the courts will be influenced though not concluded by the administrative opinion. An Agency's interpretations may take the form of "interpretative rules." More often they are made as a consequence of individual requests for rulings upon particular questions; but as "rulings" they are often scattered and not easily accessible.

4. *Substantive regulations.*—Many statutes contain provisions which become fully operative only after exercise of an agency's rule-making function. Sometimes the enjoyment of a privilege is made conditional upon regulations as, for example, where Congress permits the importation of an article "upon such rules and regulations as the Secretary of the Treasury may prescribe," or allows utilization of public forests in accord with regulations to be laid down by administrative officers. Sometimes the extent of an affirmative duty is to be fixed by regulations, as, for example, where employers are commanded to pay wages not less than those prescribed in administrative regulations. Sometimes a prohibition is made precise by regulations, as, for example, where the sale of dangerous drugs is forbidden and the determination of what drugs are dangerous is left to administrative rules. In such instances the striking characteristic of the legislation is that it attaches sanctions to compel observance of the regulations, by imposing penalties upon or withholding benefits from those who disregard their terms. Thus these substantive regulations have many of the attributes of statutes themselves and are well described as subordinate legislation.

5. *Practice and procedure.*—Most agencies issue in some form directions as to practice and procedure, but generally these are severely limited to forms of application and the bare requirements of practice. They rarely outline the whole process or indicate alternative procedures. They tend to touch upon the high spots of formality without disclosing the essential patterns of the procedures utilized by a given agency in a given type of case.

6. *Forms.*—A most useful type of information is found in forms for complaints, applications, reports, and the like. Most agencies issue these in connection with their rules of practice. They are helpful to the individual because they simplify his task and make it unnecessary for him to speculate concerning the desired contents of various official papers.

7. *Instructions.*—Some agencies operate wholly, or for the most part, through examinations, statements, or reports. In such agencies, instructions for such examinations, statements, or reports are the important form of administrative information and are, to all intents and purposes, an essential type of rule-making.

These various sources of administrative information should be recognized. As far as practicable, agencies should be authorized and directed

to make and issue, from time to time, such of them as are appropriate to the agency's functions. In compiling information of this sort, the private individual would be materially helped if each agency would take care that its information is constantly improved in form and completeness; kept current as far as possible; promptly published in the Federal Register as well as in pamphlet form; separated as to (a) agency organization, (b) procedure, and (c) substance, interpretation, or policy; and distinguished from statutory provisions with which it may be published.

Omissions in the publication of regulations having statutory effect are no longer worthy of note. Some agencies, such as the Post Office Department, however, have formulated no rules of practice, while the rules of others, by reason of obsolescence or thoughtless adoption of the rules of older agencies, are badly in need of revision to make them conform to actual practice. Where such revision is needed, it should of course be undertaken without delay. The commingling of procedural and substantive regulations is occasionally found, to the detriment of clarity and ease of use. Treasury Regulations under a particular income or estate tax law, for example, typically contain, without separation or demarcation, rules of procedure, substantive provisions supplementing specific sections, and advisory interpretations construing doubtful sections of the Act. Regulations of the Bureau of Marine Inspection and Navigation on a specific subject include provisions dealing variously with procedure and substance. For example, the proposed ocean and coastwise regulations now awaiting promulgation range from specifications of the ingredients of rivet steel to the requirement that license blanks be filled out by the inspectors in pen and black ink. Other agencies, such as the Veterans' Administration, make the distinction between procedure and substance with only partial success. Improvements in this respect should be made.

Interpretations and policy instructions to the staffs of administrative agencies are now available to the public to a limited extent, especially where interpretative regulations are formally adopted and promulgated. In addition, some agencies have expressed their instructions to their agents in available printed form. To some extent, however, the officers of some of the agencies are controlled in their dealings with outsiders by instructions or memoranda which they are not at liberty to disclose. Rarely, if at all, is there justification for such a practice. Not only does it seem unfair to the individual to compel him to meet unseen regulations, but it is inefficient to encourage representations to an agency which might be stilled if the adoption of a definite policy were known. The Committee is strongly of the opinion that, with possible rare exceptions, whenever a policy has crystallized within an agency sufficiently to be embodied in a memorandum or instruction to the staff, the interests of fairness, clarity, and efficiency suggest that it be put into

the form of a definite opinion or instruction and published as such. The extent to which the publication should be separate from that of statutory regulations will vary from agency to agency, but in general it would be wise to distinguish the two. In any event, the publication of the settled policies of each agency which affect outsiders should be complete.

### More Recent Developments

Section 3 of the Federal Administrative Procedure Act was designed to meet some of the deficiencies pointed out by the Attorney General's Committee.

Does that Act provide a satisfactory solution to these difficulties?

Suppose an agency adopts an interpretation of the governing statute which is distributed as a "confidential memo" to its staff. Its purpose is to direct and control decisions of staff assistants in matters coming before them. But, on the theory that the "memo" was adopted not for the guidance of the public but only for the guidance of the staff, it is not made publicly available. The result is, of course, that counsel appearing before the agency cannot learn the rules by which their cases will be decided. Is this sound administrative policy? Is it a violation of the requirements of section 3 of the Federal Administrative Procedure Act?

Was there compliance with the requirement of section 3 (demanding publication of a description of "all formal or informal procedures available") when the Department of State described its procedures (Federal Register of September 11, 1946, P-177A-7) by stating: "The procedures essential to compliance with the regulations of the Department and the Foreign Service are intertwined in the texts of the substantive rules comprising Subchapters B et seq. of this chapter?"

A provocative discussion of the "Extent of Agency Compliance with Section 3," by Ashley Sellers, appears in 33 A. B. A. J. 7 (1947).

### Excerpt from Report of Hoover Commission Task Force

The Hoover Commission Task Force on Legal Services and Procedures, in its 1955 report, concluded that the Act had not been effective to accomplish its intended purpose. Its recommendation, and explanatory comments, follow:

#### RECOMMENDATION NO. 28

*All substantive rules, statements of policy, and interpretations of general applicability should be published in the Federal Register, except as to matters requiring secrecy in the public interest or relating solely to internal agency management.*

#### The Problem.

Section 3 (a) of the Administrative Procedure Act, 5 U. S. C. section 1002 (a) (1952), further requires agencies to publish in the Federal

Register . . . substantive rules adopted as authorized by law and statements of general policy or interpretations formulated and adopted by the agency for the guidance of the public . . .

The purpose of this provision was to forbid the formulation of rules unavailable to, but binding upon or applicable to, the public.

The task force finds that a large number of rules, statements of general policy, and interpretations have not been published or made publicly available. Most agencies have some unpublished rules, and many have rules that are not even available for public inspection.

Substantive agency rules are often kept confidential by the agencies under two general theories. The first is that these rules relate only to matters of the internal management of the agency; the second, that they are intended for the guidance of agency personnel or State officials and not for "the guidance of the public." Agencies rarely keep rules confidential on the ground that secrecy is required in the public interest.

#### The "Internal Management" Exemption.

Inadequate statutory guides have been furnished for determining what constitutes a matter relating solely to "internal management of an agency." No clear definition of this expression is found in the legislative history of the Administrative Procedure Act. The task force considers as generally accurate the statement that, "[i]f a matter is solely the concern of the agency proper, and therefore does not affect the members of the public to any extent, there is no requirement for publication under section 3." Attorney General's Manual on the Administrative Procedure Act 18 (1947). The best agency practice confines the scope of this exception to such matters as budgetary rules, security regulations, approval of official travel, the advance of funds for travel and the issuance and account of transportation requests, certification of the accuracy of long-distance telephone calls, verification of statements of account rendered by the Treasury Department, order and approval of overtime, and the administration of oaths.

#### The "Public Guidance" Exemption.

The requirement that rules formulated and adopted for "the guidance of the public" must be published in the Federal Register was intended to except only those rules which do not affect the public, that is, rules relating solely to internal management. Under the public guidance exemption, some agencies have contended that rules, statements, and interpretations intended for the guidance of agency personnel and not for the guidance of the public are not subject to publication. When such rules are generally used by agency personnel in the determination of private rights, however, the task force believes that publication should be required.

#### Nonpublic Agency Rules.

Nonpublic rules, interpretations, and statements of policy are generally available to agency personnel in one of three forms, (1) manuals and handbooks, (2) bulletins and field letters, and (3) legal opinions and interpretations.

##### (1) Manuals and Handbooks.

The task force study has disclosed the existence of numerous manuals and handbooks containing rules which are withheld from general dissemination by the agencies concerned under the internal management and public guidance exemptions. . . .

The Claims Manual of the Bureau of Old-Age and Survivors Insurance, Department of Health, Education, and Welfare, contains hundreds of interpretative regulations not published in the Federal Register. As shown on table A at page 151, the Claims Manual defines and applies statutory language. The publication establishes a comprehensive set of interpretative regulations which govern the settlement of more than 2 million claims a year. It is available only to Bureau employees engaged in the adjudication of claims, and is not published or otherwise made available to the public.

The Operations Instructions of the Immigration and Naturalization Service are confidential communications from the Commissioner to all employees. The Instructions are kept in manual form. Like the Claims Manual of the Bureau of Old-Age and Survivors Insurance, the Operations Instructions contain many interpretative regulations of general applicability, defining and applying statutory language, and statements as to when the agency will seek the imposition of fines under certain criminal statutes within its jurisdiction. . . .

The vast amount of detailed procedure that has been created to administer the various statutes within the jurisdiction of the Veterans' Administration has presented that agency with a problem probably not encountered elsewhere in the executive branch. One hundred and forty-five manuals setting forth its operations have been prepared. The great majority of regulations contained in these manuals relate to matters of no public interest. In general, the purpose of the manuals is to state the duties of administrative officials and employees and to describe organization and the flow of work. A small percentage of these rules, however, are interpretative guides to be followed by agency personnel in determining eligibility to benefits, which should be published under the Administrative Procedure Act.

#### (2) Bulletins and Field Letters.

In recommending the enactment of the Administrative Procedure Act, the House Judiciary Committee stated, Senate Document 248, 79th Congress, 2d session 256 (1946):

" . . . Mimeographed releases of many kinds now common should no longer be necessary since, if they contain really informative matter, they must be published as rules, policies, or interpretations. . . ."

This expectation has not been completely fulfilled. Several agencies have reported to the task force the use of various types of bulletins, field letters, interoffice directives, and circulars. While such publications may help to promote employees' knowledge of agency organization and procedure, they are costly and should be discontinued unless their worth is clearly established. Moreover, these bulletins and field letters often contain rules of general applicability and legal effect used by employees in the performance of their duties, without disclosure to the public.

#### (3) Legal Opinions and Interpretations.

Some 22 agencies maintain compilations or files of legal opinions and interpretations which do not involve the adjudication of cases. In most cases opinions of this nature are not published. Several agencies, however, have taken measures to insure that opinions of general applicability which are not held confidential for good cause are at least made available for public inspection.

The Veterans' Administration, for example, has divided its General Counsel opinions into two classes, those of general applicability and

those of particular applicability. The former group is made available to the public. In the Department of Agriculture nonconfidential opinions and memoranda of the Solicitor are available for inspection in the Department's library. In other agencies opinions or interpretations of this kind are not available to the public. . . .

#### Conclusions.

Substantive rules, statements of policy, and interpretations are issued by agencies in many forms. Whether contained in manuals, handbooks, digests, indexes, legal opinions and interpretations, bulletins, field letters, circulars, or instructions, they should conform to the publicity requirements of section 3 of the Administrative Procedure Act if they are used by agency employees in the performance of duties which affect members of the public.

It has been said that confidential treatment of many rules is permitted by the interpretation of section 3 that they are intended for the guidance of agency officials and employees and are not for the guidance of the public. To correct this, the task force recommends that the section be amended to require the publication of substantive rules and statements of policy or interpretations formulated, adopted, or used by an agency, and that the phrase "formulated and adopted by the agency for the guidance of the public" be repealed.

The task force believes that many rules now kept confidential, on the theory that they relate solely to internal agency management, should be published in the Federal Register or be made publicly available in accordance with alternative procedures to be prescribed by the Office of Legal Services and Procedures. That Office could perform a valuable function by surveying the multitude of manuals, handbooks, and other materials to establish detailed and uniform criteria governing the determination of what rules may be left unpublished under this exemption.

## SECTION 2. FORM OF ADMINISTRATIVE RULES AND ORDERS

**Wichita Railroad & Light Co. v. Public Utilities Commission, United States Supreme Court, 1922. 260 U. S. 48, 67 L. Ed. 124, 43 S. Ct. 51.**

[The plaintiff had been purchasing electric power from the Kansas Gas and Electric Company, at rates fixed by a contract entered into in 1914. In 1918 the Kansas company petitioned the Commission for an increase in rates because, so it alleged, the extraordinary increase in the cost of production and distribution had destroyed its margin of profit.]

The order of the Commission upon this petition recited that it "came duly on for order by the Commission upon the pleadings of the respective parties and the evidence introduced thereunder; and the Commission upon consideration of said pleadings and evidence and being duly advised in the premises, finds that the Kansas Gas & Electric Company should be authorized and permitted to add to its existing rates for electricity supplied by it to consumers in the State of Kansas, until further order of the Commission, the following net surcharge:

"For the first 100 kwh per month, no surcharge.

"For the next 14,900 kwh per month, 1 mill surcharge per kwh.

"For the next 20,000 kwh per month, 2 mills surcharge per kwh.

"For all excess over 35,000 kwh per month, 3 mills surcharge per kwh."

The rates thus fixed were substantially higher than the contract rates.

The Wichita Company, thereupon, filed a bill in equity in the United States District Court for Kansas seeking to enjoin the Commission from putting the new rates in force as against. . . .

The Wichita Company made a motion for judgment on the pleadings, on the ground that the order of the Commission was void on its face. . . . The District Court gave judgment for the Wichita Company on the pleadings and enjoined the Commission and the Kansas company from putting into force the increased rates. The Circuit Court of Appeals reversed the decree of the District Court and directed a dismissal of the bill.

The Wichita Company has appealed to this court.

MR. CHIEF JUSTICE TAFT, after stating the case as above, delivered the opinion of the court. . . .

The Public Utility Law of Kansas, c. 238 of the Session Laws of 1911, creates a Commission and makes full provision for its procedure and powers. Section 13 provides that:

"It shall be the duty of the Commission, either upon complaint or upon its own initiative, to investigate all rates, . . . fares . . . and if after full hearing and investigation the Commission shall find that such rates . . . are unjust, unreasonable, unjustly discriminatory or unduly preferential, the Commission shall have power to fix and order substituted therefor such rate or rates . . . as shall be just and reasonable." . . .

The proceeding we are considering is governed by section 13. That is the general section of the act comprehensively describing the duty of the Commission, vesting it with power to fix and order substituted new rates for existing rates. The power is expressly made to depend on the condition that after full hearing and investigation the Commission shall find existing rates to be unjust, unreasonable, unjustly discriminatory or unduly preferential. We conclude that a valid order of the Commission under the act must contain a finding of fact after hearing and investigation, upon which the order is founded, and that for lack of such a finding, the order in this case was void.

This conclusion accords with the construction put upon similar statutes in other States. *Public Utilities Commission v. Springfield Gas & Electric Co.*, 291 Ill. 209; *Public Utilities Commission v. Baltimore & Ohio Southwestern R. R. Co.*, 281 Ill. 405. Moreover, it accords with general principles of constitutional government. The maxim that a legislature may not delegate legislative power has some qualifications,

as in the creation of municipalities, and also in the creation of administrative boards to apply to the myriad details of rate schedules the regulatory police power of the State. The latter qualification is made necessary in order that the legislative power may be effectively exercised. In creating such an administrative agency the legislature, to prevent its being a pure delegation of legislative power, must enjoin upon it a certain course of procedure and certain rules of decision in the performance of its function. It is a wholesome and necessary principle that such an agency must pursue the procedure and rules enjoined and show a substantial compliance therewith to give validity to its action. When, therefore, such an administrative agency is required as a condition precedent to an order, to make a finding of facts, the validity of the order must rest upon the needed finding. If it is lacking, the order is ineffective.

It is pressed on us that the lack of an express finding may be supplied by implication and by reference to the averments of the petition invoking the action of the Commission. We can not agree to this. It is doubtful whether the facts averred in the petition were sufficient to justify a finding that the contract rates were unreasonably low; but we do not find it necessary to answer this question. We rest our decision on the principle that an express finding of unreasonableness by the Commission was indispensable under the statutes of the State.

We think the motion for judgment on the pleadings should have been granted.

The decree of the Circuit Court of Appeals is reversed and that of the District Court is affirmed.<sup>3</sup>

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<sup>3</sup> "The Commission's [I. C. C.] failure specifically to report the facts and give the reasons on which it concluded that under the circumstances the use of the average or group basis is justified, leaves the parties in doubt as to a matter essential to the case, and imposes unnecessary work upon the courts called upon to consider the validity of the order. Complete statements by the Commission showing the grounds upon which its determinations rest are quite as necessary as are opinions of lower courts setting forth the reasons on which they base their decisions in cases analogous to this." *Beaumont, S. L. & W. Ry. Co. v. United States*, 282 U. S. 74, 75 L. Ed. 221, 51 S. Ct. 1 (1930).

"More and more the judicial example and influence exerted in applying constitutional limitations have moulded administration. One of the great characteristics of judicial process, of equal importance with orderly procedure and competent personnel, is the judicial habit of publishing to the world the reasons for decision—unquestionably, this limitation upon the judges themselves results in greater care and understanding of the problems brought before them. In contrast, the unexplained fiat of administrative agencies is a serious defect. Important administrative tribunals have been sharply criticized by the profession and by the courts for failure to publish their considerations and reasons for action—and reforms have resulted." *McFarland, "Administrative Agencies in Government and the Effect Thereon of Constitutional Limitations,"* 20 A. B. A. Jour. 612, 623 (1934).



**Saginaw Broadcasting Co. v. Federal Communications Commission, Court of Appeals for the District of Columbia, 1938. 96 F. (2d) 554.**

Proceeding by the Saginaw Broadcasting Company against the Federal Communications Commission to obtain a radio station construction permit, wherein Harold F. Gross and Edmund C. Shields also sought such a permit. From an order denying the application for the permit, plaintiff appealed and Harold F. Gross and Edmund C. Shields filed notice of intention to intervene in the appeal. . . .

STEPHENS, Associate Justice. This is an appeal taken under Section 402 (b) (1) of the Communications Act of 1934, 47 USCA § 402 (b) (1), from an order of the Broadcast Division of the Federal Communications Commission denying the application of the appellant for a radio station construction permit, and granting the application of the intervenors for such a permit.

On September 30, 1935, the Saginaw Broadcasting Company, the appellant (hereinafter referred to as such), filed an application for a permit to construct a radio station in Saginaw, Michigan, to operate on the frequency of 1200 kilocycles with a power of 250 watts until local sunset and 100 watts at night. The hours of operation were to be those portions of the broadcast day not occupied by WMPC, a station already in operation on the same frequency in Lapeer, Michigan, a city 40 miles from Saginaw. On February 21, 1936, Harold F. Gross and Edmund C. Shields, the intervenors (hereinafter referred to as such), filed an application for a permit to construct a station in Saginaw to operate on the frequency of 950 kilocycles with a power of 500 watts. Continuous operation was proposed during the day until local sunset; no broadcasts were to be made at night.

In March, 1936, the Broadcast Division designated these applications for hearing and later a joint hearing was held thereon before a trial examiner. The examiner recommended that the appellant's application be granted, and that that of the intervenors be denied. Oral argument was had before the Broadcast Division on exceptions to the examiner's report. The Division refused to adopt the recommendation of the examiner and entered an order on February 9, 1937, granting the appli-

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The problem involved in the Wichita case arises only where the controlling statute does not expressly require the agency to make specific findings of fact. The problem does not often arise. Ordinarily (see, for example, Sec. 8(b) of the Federal Administrative Procedure Act) the applicable statute does expressly require that formal findings be filed. Where there is such express requirement, the difficulties arising are of a different nature, as will be seen in the following cases.

However, in those comparatively rare situations where the problem involved in the Wichita case does arise, there is some disagreement with the declaration in Wichita that the required finding (as to the existence of the necessary ultimate facts) may not be supplied by implication. Cases are collected in 146 A. L. R. 209.

cation of the intervenors and denying that of the appellant. The effective date of the order was stated therein to be March 16, 1937. The order, as it appears in the record, contains no findings of fact, but states merely that "The Commission will issue and publish at a subsequent date an opinion setting forth a statement of the facts appearing of record and the grounds for the decision herein reached."<sup>4</sup> The Commission's statement of facts and grounds for decision was filed on March 16, 1937, the effective date of the order. On April 2, 1937, the appellant filed an application for rehearing. This was denied by the Commission on June 2, 1937. On June 18, 1937, the appellant filed its notice of appeal and reasons therefor. Within proper time the intervenors filed notice of intention to intervene in the appeal, as provided by Section 402 (d) of the Act. . . .

The appellant assigns as reasons for its appeal numerous alleged errors of the Commission in making, and in failing to make, specific findings of fact from the evidence adduced at the hearing. These assignments require an inquiry into the purpose and necessary content of findings of fact under the Communications Act.

The Act in Section 319 (a), 47 USCA § 319 (a), provides that the Commission may grant a construction permit for a radio station, if public convenience, interest, or necessity will be served. Section 402 (b) of the Act provides that an appeal may be taken to this court from a denial of an application for a construction permit. Section 402 (c) provides that within 30 days after the filing by the unsuccessful applicant of a notice of appeal and a statement of the reasons therefor, the Commission shall file with the court the originals or certified copies of all papers and evidence presented to it upon the application involved in the appeal, and a like copy of the Commission's decision, and that the Commission shall within 30 days thereafter file "a full statement in writing of the facts and grounds for its decision as found and given by it." Section 402 (e) provides that the review of this court shall be limited to questions of law, and that findings of fact by the Commission, if supported by substantial evidence, shall be conclusive unless they shall clearly appear to be arbitrary or capricious. Thereby the Act has set out a criterion to govern the Commission in granting or refusing to grant a construction permit, has required a full statement in writing

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<sup>4</sup> The minutes of the Broadcast Division for February 9, 1937, recite, however, that "Upon consideration of the application, record and evidence in these cases, . . . the Broadcast Division this day found that the public interest, convenience, and necessity would not be served by granting the application of Saginaw Broadcasting Co., for construction permit, and that public interest, convenience, and necessity would be served by granting the application of Harold F. Gross and Edmund C. Shields, . . ." This appears in the brief of the Commission, not in the record. But even if it were in the record, it does not, as will appear below, constitute a sufficient finding of fact.

of the facts and grounds for its decision, and has provided the standards for judicial review.

The requirement that courts, and commissions acting in a quasi-judicial capacity, shall make findings of fact, is a means provided by Congress for guaranteeing that cases shall be decided according to the evidence and the law, rather than arbitrarily or from extralegal considerations; and findings of fact serve the additional purpose, where provisions for review are made, of apprising the parties and the reviewing tribunal of the factual basis of the action of the court or commission, so that the parties and the reviewing tribunal may determine whether the case has been decided upon the evidence and the law or, on the contrary, upon arbitrary or extralegal considerations. When a decision is accompanied by findings of fact, the reviewing court can decide whether the decision reached by the court or commission follows as a matter of law from the facts stated as its basis, and also whether the facts so stated have any substantial support in the evidence. In the absence of findings of fact the reviewing tribunal can determine neither of these things. The requirement of findings is thus far from a technicality. On the contrary, it is to insure against Star Chamber methods, to make certain that justice shall be administered according to facts and law. This is fully as important in respect of commissions as it is in respect of courts.

In discussing the necessary content of findings of fact, it will be helpful to spell out the process which a commission properly follows in reaching a decision. The process necessarily includes at least four parts: (1) evidence must be taken and weighed, both as to its accuracy and credibility; (2) from attentive consideration of this evidence a determination of facts of a basic or underlying nature must be reached; (3) from these basic facts the ultimate facts, usually in the language of the statute, are to be inferred, or not, as the case may be; (4) from this finding the decision will follow by the application of the statutory criterion. For example, before the Communications Commission may grant a construction permit it must, under the statute, be convinced that the public interest, convenience, or necessity will be served. An affirmative or negative finding on this topic would be a finding of ultimate fact. This ultimate fact, however, will be reached by inference from basic facts, such as, for example, the probable existence or non-existence of electrical interference, in view of the number of other stations operating in the area, their power, wave length, and the like. These basic facts will themselves appear or fail to appear, as the case may be, from the evidence introduced when attentively considered. Thus, upon the issue of electrical interference evidence may be introduced concerning power and wave length of a proposed station and of existing stations, and expert opinion based upon this evidence may be offered as to the likelihood of interference; and expert opinion based on evidence of field measurements of signal strength of existing stations may also

be offered. This testimony may conflict. It is the Commission's duty to find from such evidence the basic facts as to the operation of the proposed and present stations in respect of power, wave length, and the like, and whether or not electrical interference will result from the operation of the proposed station, and then to find as an ultimate fact whether public interest, convenience, or necessity will be served by granting or not granting the application.

We ruled in *Missouri Broadcasting Corporation v. Federal Communications Commission*, 68 App. D. C. 154, 94 F. 2d 623, 1937, and again in *Heitmeyer v. Federal Communications Commission*, 68 App. D. C. 180, 95 F. 2d 91, 1937, that findings of fact in the broad terms of public convenience, interest, or necessity, the criterion set up by Section 319 (a) of the Act, were not sufficient to support an order of the Commission. We now rule that findings of fact, to be sufficient to support an order, must include what have been above described as the basic facts, from which the ultimate facts in the terms of the statutory criterion are inferred. It is not necessary for the Commission to recite the evidence, and it is not necessary that it set out its findings in the formal style and manner customary in trial courts. It is enough if the findings be unambiguously stated, whether in narrative or numbered form, so that it appears definitely upon what basic facts the Commission reached the ultimate facts and came to its decision.

Our conclusions on this topic are, we think, confirmed by the decisions of the Supreme Court which consider what findings of fact are necessary in reports of the Interstate Commerce Commission. Section 14 of the Interstate Commerce Act, 34 Stat. 589, 49 USC § 14 (1934), 49 USCA § 14, requires only that the report of the Commission shall state its conclusions, unless damages are to be awarded. Nevertheless, the Supreme Court has laid down the rule that, although under this section formal findings of fact are not required, substantial findings of the basic and essential facts necessary to support the order must appear. See *United States v. Baltimore & Ohio R. Co.*, 1935, 293 U. S. 454, 465, 55 S. Ct. 268, 273, 79 L. Ed. 587. In *Florida v. United States*, 1931, 282 U. S. 194, 51 S. Ct. 119, 75 L. Ed. 291, the order of the Commission was one regulating intrastate rates upon the shipment of logs. The Commission based its power to make the order upon Section 13 (4) of the Interstate Commerce Act, 49 USCA § 13 (4), and made a general finding in the language of that section that the intrastate rates in force before the order resulted in "unjust discrimination against interstate commerce." The Court pointed out that the Commission made no findings as to the revenue which had been derived by the carrier from the traffic in question, or which could reasonably be expected under the increased rates, and made no finding that the alteration of the intrastate rates would produce additional income necessary to prevent an undue burden upon the carrier's interstate revenue. The Court then said:

"The question is not merely one of the absence of elaboration or of a suitably complete statement of the grounds of the Commission's determination, to the importance of which this Court has recently adverted . . . but of the lack of the basic or essential findings required to support the Commission's order. In the absence of such findings, we are not called upon to examine the evidence in order to resolve opposing contentions as to what it shows or to spell out and state such conclusions of fact as it may permit. The Commission is the fact-finding body and the Court examines the evidence not to make findings for the Commission but to ascertain whether its findings are properly supported." [282 U. S. 194, at page 215, 51 S. Ct. 119, 125, 75 L. Ed. 291.]

Similarly, in *United States v. Chicago, M., St. P. & P. R. Co.*, 1935, 294 U. S. 499, 55 S. Ct. 462, 79 L. Ed. 1023, Mr. Justice Cardozo stated, in reversing an order of the Commission because of its failure to find the necessary facts:

"In brief, a schedule of lowered tariffs has been canceled though the facts that control the validity of the reduction have yet to be determined. . . . We would not be understood as saying that there do not lurk in this report phrases or sentences suggestive of a different meaning. One gains at places the impression that the Commission looked upon the proposed reduction as something more than a disruptive tendency; that it found unfairness in the old relation of parity between Brazil and Springfield; and that the new schedule in its judgment would confirm Milwaukee in the enjoyment of an undue proportion in the traffic. The difficulty is that it has not said so with the simplicity and clearness through which a halting impression ripens into reasonable certitude. In the end we are left to spell out, to argue, to choose between conflicting inferences. Something more precise is requisite in the quasi-jurisdictional findings of an administrative agency. [Citations.] We must know what a decision means before the duty becomes ours to say whether it is right or wrong." 294 U. S. 499, at pages 510, 511, 55 S. Ct. 462, at page 467, 79 L. Ed. 1023.

Decisions of state courts also support our conclusions. Thus in *Kewanee & G. Ry. Co. v. Illinois Commerce Comm.*, 1930, 340 Ill. 266, 172 N. E. 706, a certificate of public convenience and necessity was granted to a motor carrier for the transportation of freight between certain cities and towns in Illinois. This action was based upon findings:

". . . that the existing facilities for the transportation of property between . . . [named towns and cities] are inadequate and insufficient for the convenience and necessity of the public and that the public utilities now occupying some parts of this territory cannot reasonably be required to provide the necessary frequency of service; that the public convenience and necessity require the operation of motor vehicles for the transportation of property between the points hereinabove named." [340 Ill. 266, at page 268, 172 N. E. 706, at page 707.]

The court held that these findings were insufficient to support the order saying:

"The findings made by the commission express a mere conclusion that the present facilities for the transportation of property between all these communities are inadequate and insufficient for the convenience and necessity of the public and that public convenience and necessity require the operation of motor vehicles for the transportation of property between said communities. These findings are not specific enough to enable the court to review intelligently the decision of the commission and ascertain if the facts on which the commission has based its order afford a reasonable basis for it [citations], and the order is therefore void, [citations]." [340 Ill. 266, at pages 269, 270, 172 N. E. 706, at page 708.]

These decisions show that a reviewing court cannot properly exercise its function upon findings of ultimate fact alone, but must require also findings of the basic facts which represent the determination of the administrative body as to the meaning of the evidence, and from which the ultimate facts flow. Such findings are, we think, just as necessary in cases involving the application of the statutory criterion of public convenience, interest, or necessity set up by the Communications Act, as in those cases which under the Interstate Commerce Act require the application of the standard of unjust discrimination, or in those cases which under state public utility statutes require the application of the criterion of public convenience and necessity.

With these principles in mind we turn to the appellant's specific reasons for appeal. In the view which we take of the case, however, it is necessary for us to consider only those reasons which relate to two issues of fact, namely, the proposed schedule of hours and the financial qualifications of the intervenors. . . .

[The court thereupon examined the record and found that the findings of the commission were insufficient and in some instances were not supported by the evidence.]

Reversed and remanded.<sup>5</sup>

### **Extent of Detail Required in Agency Findings of Fact**

Under statutes such as that involved in the Saginaw Broadcasting case, requiring the agency to file written findings of fact (and it might be noted that such provisions are almost standard practice in both federal and state statutes) difficult problems arise as to the extent to which the agency must go into detail in setting forth the facts on which its decision is predicated. A mere recital of the ultimate facts is not enough; for, as the court observed in the principal case, this does not

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<sup>5</sup> For a critical comment on this case, see Timberg, "Administrative Findings of Fact," 27 Wash. Univ. L. Q. 62 (1941) and 169 (1942).

enable the reviewing court to ascertain whether the evidence supports the finding, or whether the conclusion properly follows as a matter of law from the facts found. On the other hand, agencies are not required to state all the evidentiary facts; such detail would be too burdensome both for the agency and for the reviewing court. Between these two extremes lie what are called the "basic facts." The rule is that these "basic facts" must be spelled out in the agency findings.

The distinction can be illustrated by an example. In the principal case, one of the "ultimate facts" was the finding that there was a need in the Saginaw area for uninterrupted daytime broadcasts. This conclusion of "ultimate fact" might have been supported, conceivably, by such "basic facts" as the following (which are purely hypothetical): Many farmers in the Saginaw area grow beans which they sell at wholesale to market agencies; the prevailing prices fluctuate from day to day, and it is necessary (if the farmers are to get the best price) that they have daily information as to current market prices; to obtain this information on a current day-to-day basis, the farmers must depend on radio reports; the nearest stations outside Saginaw which broadcast such daily market reports were located 150 miles away; it was impossible to obtain satisfactory reception of reports broadcasted from these distant stations during daytime hours.

Such "basic facts," the court held, must be set forth in the agency's findings as support for the agency's conclusion respecting the "ultimate fact" concerning the need for uninterrupted daytime broadcasts. On the other hand, the findings need not detail all the evidence, as presented by several score witnesses and voluminous charts and exhibits, which supported such "basic facts."

In many cases, unfortunately, it is not easy to draw the line between the "basic facts" and the "ultimate facts." How far must the agency go into detail, to enable the reviewing court properly to discharge its responsibilities, as described in the principal case?

Suppose, for example, the Interstate Commerce Commission finds that intrastate rates of a common carrier discriminate against interstate commerce. Must the agency go further, and explain the "basic facts" which support the conclusion of discrimination? See *Florida v. United States*, 282 U. S. 194, 75 L. Ed. 291, 51 S. Ct. 119 (1930). Suppose the agency went one step further, finding that such discrimination existed because the intrastate rates were "unreasonably low." Is this enough? See dictum in *Atlantic Coast Line R. Co. v. Florida*, 295 U. S. 301, 79 L. Ed. 1451, 55 S. Ct. 713 (1935). Suppose the agency added the further finding that the intrastate rates were unreasonably low because the carrier charged twice as much for an interstate haul across the state as for an intrastate haul between the same terminals. Does this go far enough to enable the reviewing court to ascertain whether the finding is supported by the evidence, and whether the conclusion properly

follows as a matter of law from the facts found? See *Florida v. United States*, 292 U. S. 1, 78 L. Ed. 1077, 54 S. Ct. 603 (1934).

Consider a case involving a complaint before the Federal Trade Commission charging sales below cost with intent to injure competition. Is a finding that sales were made below cost a "basic fact" or an "ultimate fact?" It might be that the issue whether the sales price was slightly above cost, or just below, would depend on whether the amount spent for certain business equipment which the seller had acquired during the year must be written off as a current expense (bringing the cost to a level just above the sales price) or whether the amount spent for the equipment could be capitalized, and amortized over a period of years (leaving the cost slightly below sales price). If it is concluded that the agency must explain the basis for its conclusion that sales prices were below cost, the next question is whether the Commission must go further, and explain why it concluded that the amount which the seller paid for the equipment must be charged off as a current expense, and not amortized.

How about a finding by the Tax Court (which is not really an administrative agency) that a gift was made in contemplation of death? Or a finding by the Securities & Exchange Commission that the failure to state the maturity date of a mortgage on the issuer's factory (in a prospectus describing a new stock offering) was a "material omission?" Or a finding by the National Labor Relations Board that an employer's motive in discharging an employee was to discourage an organizing drive by a union?

As these questions may indicate, it is not easy to find the dividing line between "basic facts" and "ultimate facts." The problem has plagued the agencies for years. The draftsmen of the Federal Administrative Procedure Act sought to ameliorate the difficulties by providing in section 8 (b) that the parties would have the right to submit to the agency proposed findings, and that the agency should include in the record its ruling upon each such proposed finding. This provision was intended to provide a convenient means of achieving the desired end of enabling the reviewing court to determine whether the agency's conclusions were supported by basic facts and whether these in turn were supported by evidence. Such was the purpose of the provision that each interested party could submit to the agency that party's contentions as to the basic facts which it was thought supported, pro or con, the ultimate propositions which the agency was required to decide. By requiring the agency to rule specifically on each such proposed finding, and to state its "reasons or basis therefor," it was intended to bring sharply into focus the exact basis of the agency's conclusion, and thus aid the reviewing court in its task (and incidentally, perhaps, require hard, clear thinking by the staffs of the agencies).



The agencies have not accorded a hospitable reception to this new requirement. In one case (involving a state agency under a similar state statute) the agency ruled that each and every exception proposed by respondent was "without merit." Does this comply with the statutory mandate? See *Pennsylvania R. Co. v. New Jersey State Aviation Commission*, 2 N. J. 64, 65 A. (2d) 61 (1949). In another case, a federal agency overruled 33 proposed findings of fact, stating that each one was "wholly, or in part, contrary to fact, or erroneous in law, or immaterial." Does this comply with the requirement of the statute?

A somewhat different approach to the same problem is suggested in the recommendation of the Hoover Commission Task Force on Legal Services and Procedure (1955) that the findings must be made by the officer who hears the evidence. Will this recommendation, if adopted, go further toward solving the problem? <sup>6</sup>

**Tesch v. Industrial Commission of Wisconsin, Supreme Court of Wisconsin, 1930. 200 Wis. 616, 229 N. W. 194.**

Action begun August 13, 1928; judgment entered June 21, 1929. Workmen's Compensation. Emil Brustman, deceased husband of the claimant, was fatally injured on December 19, 1927, by falling from the roof of a house which was being constructed on the farm of the defendant Cowling. There was an old house upon the farm. Cowling employed Tesch to remodel the house, and for that purpose a part of it was to be torn down. Tesch received eighty cents per hour for his labor. It was planned in the beginning that Cowling and his farm hands would aid in the process. Tesch had done a small amount of contracting, and two men, formerly employed by him, sought employment. He consulted with Cowling, who first objected to the wages asked by the proposed employees, but subsequently assented thereto, and the work was continued by Tesch and the two men. There were no plans or specifications for the building. There was no sum named as a contract price. As the work progressed, Cowling determined to tear down the entire structure and rebuild it as he wanted it. During the time they were working upon the Cowling building, Tesch, Brustman, and another went to finish a small job for Brustman. They returned to the work on the Cowling farm, and while engaged in the work Brustman slipped, fell from the roof, and was killed.

The sole question raised upon the hearing was whether Tesch was an employee of Cowling or an independent contractor. The commission made the following finding of fact:

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<sup>6</sup> For a general discussion of the adequacy of administrative findings, see Jaffe, "Administrative Findings or the Ameer in America," 34 Cornell L. Q. 473 (1949).

"That on December 19, 1927, one Emil Brustman and respondent Edwin Tesch were both subject to the provisions of the workmen's compensation act and that the liability of the respondent Edwin Tesch was not insured under the provisions of said act; that the respondent David Cowling on said day was a farmer and was not subject to the provisions of the workmen's compensation act; that on said day said Emil Brustman was employed by said Edwin Tesch, and while performing service growing out of and incidental to his employment was accidentally injured," etc.

This action was begun in the circuit court for Dane county to review the award of the Industrial Commission. Judgment was entered confirming the award, from which the plaintiff, Tesch, appeals. . . .

ROSENBERY, C. J. The perusal and consideration of the record in this case in the light of other cases recently before the court has led us to reconsider some of the essential features of the workmen's compensation act (ch. 102, Stats.), especially those regarding the determination of questions of fact.

The act (sec. 102.18) requires that after final hearing the commission shall make and file (1) its findings upon all the facts involved in the controversy, and (2) its award, which shall state its determination as to the rights of the parties.

The act (sec. 102.23) also provides that the findings of fact made by the commission acting within its powers shall in the absence of fraud be conclusive and that the award is subject to review only upon the grounds stated in the section.

Under these provisions of the act it has been held consistently that if there is evidence which supports the finding of the commission, even though it be against the great weight or clear preponderance of the evidence, the finding may not be disturbed by the court on review.

The state of the record in this case leads us to consider what is meant by a finding of fact as that term is used in the statute. . . .

The only disputed question in this case was whether or not Tesch was an employer of Brustman. The response made to that situation by the findings of the commission was "that on said day said Emil Brustman was employed by said Edwin Tesch." . . .

. . . A statement of the decision does not constitute a compliance with the requirements of sec. 102.18. The findings recite quite fully the undisputed facts; this no doubt in response to the statutory injunction that the findings of the commission shall cover "all the facts involved in the controversy." If the commission is of the opinion that the facts are undisputed it should indicate that conclusion by its finding. If the facts are in dispute the controversy should be resolved one way or the other. Upon the disputed question in each of these cases the so-called finding is in fact the decision of the commission. The mere

fact that it is found under the title "Findings of fact" does not affect its real character.

This leads us to the consideration of another matter. The very term *findings of fact* indicated a determination of what is established by all of the evidence in the case. The mere fact that the finding of the commission may not be set aside under the statute because it is against the great weight and clear preponderance of the evidence does not relieve the commission of the duty to make the findings in accordance with the weight and preponderance of the evidence. While the statute relieves the court of the responsibility of reviewing the finding, it adds to the dignity and responsibility of the commission when it makes these findings conclusive. The legal rights and relations of the claimant and employer are determined upon the findings of the commission. If these are made contrary to the weight and preponderance of the evidence, the parties have no right to a review. An injustice is done them for which there is no remedy.

We do not say that formal findings such as should be filed by a circuit judge in cases tried by the court are required. There should be at least an informal recital of the facts which the commission finds to be established. For some years a document designated a memorandum accompanied the so-called findings of fact. That answered the requirements very well in most cases. *Voelz v. Industrial Comm.* 161 Wis. 240, 152 N. W. 830. Of late, decisions have not been accompanied by a statement of facts in any form,—merely a statement of the ultimate conclusions arrived at upon both the law and the facts.

Differentiation of findings of fact and conclusions of law is admittedly often a difficult task. Probably no better rule of thumb can be devised than that suggested in *Weyauwega v. Industrial Comm.* 180 Wis. 168, 192 N. W. 452, where it is said:

"Whether a finding is an ultimate fact or conclusion of law depends upon whether it is reached by natural reasoning or by the application of fixed rules of law."

That is, where the ultimate conclusion can be arrived at only by applying a rule of law, the result so reached embodies a conclusion of law and is not a finding of fact. Consequently when, as in this case, the commission says, "that on said day said Emil Brustman was employed by said Edwin Tesch," it merely announces its decision. Applying the legal definition of employer and employee, it reaches the conclusion that the relation existing between Tesch and Brustman was that of employer and employee; the facts to which the commission applied the rule of law do not appear in the findings. . . . We have reviewed very carefully all of the evidence. So far as we can discover there is no conflict in the evidence, nor is there a single fact which even indicates that

Brustman was the employee of Tesch. On the contrary, it clearly and conclusively appears that Brustman was the employee of Cowling.

The attempt of the attorney-general to point out evidence which supports the findings drives him to the necessity of supporting the finding of the commission by the following:

Cowling testified: "Well, I was figuring on building a house and Mr. Tesch wanted to figure on it and so I knew Mr. Tesch for quite a while and I thought I could help him by leaving him or letting him do the work.

"Mr. Tesch was the man I hired and was the only man I was to pay; I didn't have anything to do with the rest of the men at all."

On cross-examination he was asked:

"Q. Did you give any directions to any of these men while they were doing the work? A. No one, only to Mr. Tesch.

"Q. Had you ever talked to any of the workmen concerning this work before the accident? A. No, sir, I hadn't.

"Q. Whenever you wanted to give any directions as to what was to be done on that job, to whom did you go? A. Mr. Tesch."

One of the carpenters testified:

"Q. Who was the foreman on the job if anybody? A. Mr. Tesch would have been the foreman because he had charge of the whole thing."

And the further statement of Cowling:

"I didn't want control of the work myself because I had all I could control right where I was."

He also points to the fact that Tesch at some time prior to his employment by Cowling had done contracting, and that after the accident Tesch and Cowling did enter into a contract for the completion of the work.

The attempt to support a finding by taking bits of testimony out of their context and considering them alone apart from other undisputed circumstances in the case, and then claiming that a finding supported in that manner is beyond review because supported by testimony, is wholly inconsistent with the fundamental principles embodied in the legal concept of a hearing as that term is used in American law. Considered in connection with the remainder of the testimony, the portions quoted become wholly insignificant and tend to support the opposite conclusion. Witnesses sometimes attempt to stage legal conclusions rather than the facts. This is well enough where there is no controversy. Even expert witnesses are not permitted to express an opinion with respect to the issues in the case, but only what conclusion should be drawn in the light of expert knowledge from certain established facts. The mere fact that a witness says he was hired or that he was employed, or that he was under or not under the act, or other similar matters is not evidence; it is simply a statement by the witness of what he thinks the

legal relation of the parties is, after applying the law to the facts. In making his determination he may consider facts not in evidence at all; he may be and very likely is in error as to the law. His conclusions, which are really decisions, are not evidence.

A. may testify that he is the child and legal heir of X. This is well enough ordinarily. Suppose, however, the matter under investigation is whether X. was not, prior to his pretended marriage to A.'s mother, married to B., who is still living and from whom he has never been divorced. Upon that issue A.'s statement that he is an heir of X. amounts to nothing. So the statement of one that he is employed to another states what the witness thinks the legal relation between him and the other is, not the facts out of which the relationship, whatever it may be, arises. Under the statute it is the duty of the commission to find the facts. When the facts are found a question of law is presented. The application of the law to the facts results in a decision which determines questions of liability. The requirement of the statute that the commission find the facts and state them fully was no doubt inserted for the very purpose of presenting questions of law and enabling such questions to be reviewed. When a so-called finding of fact includes the ultimate conclusion as to liability, such a review is prevented in all cases except where the evidence is undisputed, and so the legislative purpose is defeated, parties are deprived of the limited right of review which the statute gives them. . . .

[The court thereupon proceeded to examine the record in the case so far as it related to the question as to whether the relationship between Tesch and Brustman was one of employer and employee. The court concluded that the facts showed that Cowling was at all times in absolute control of the enterprise and hence that Tesch was not an independent contractor, but was an employee of Cowling. Thereupon Brustman was not an employee of Tesch but of Cowling.]

It clearly appearing that Tesch was not the employer of the deceased husband of the claimant, the judgment of the circuit court affirming the award should be reversed, and the cause remanded with directions to enter judgment setting aside the award of the Industrial Commission.

By the court—It is so ordered.<sup>7</sup>

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<sup>7</sup> Was the court correct in characterizing as a question of law the issue whether the proven facts established a relationship of employer-employee? Cf., *N. L. R. B. v. Hearst Publications, Inc.*, 322 U. S. 111, 88 L. Ed. 1170, 64 S. Ct. 851 (1944) *infra*, ch. IX, where the court ruled that the agency's decision on this question must be accepted "if it has 'warrant in the record' and a reasonable basis in law." Does any reason occur to you why a court might want to describe the existence of the employer-employee relationship as a question of law in workmen's compensation cases, and a question of fact in cases involving unfair labor practices?

## SECTION 3. SCOPE OF ORDER

**National Labor Relations Board v. Express Publishing Co., Supreme Court of the United States, 1941. 312 U. S. 426, 85 L. Ed. 930, 61 S. Ct. 693.**

Petition by the National Labor Relations Board to enforce an order requiring the Express Publishing Company to cease and desist from unfair labor practices and to take certain affirmative action. To review a judgment of the Circuit Court of Appeals, 111 F. 2d 588, modifying the order and enforcing the order as modified, the National Labor Relations Board brings certiorari. . . .

MR. JUSTICE STONE delivered the opinion of the court. . . .

The Board issued its complaint charging respondent, a publisher of a newspaper, with refusal to bargain collectively with the [San Antonio Newspaper] Guild as the authorized representative of the employees in respondent's editorial department, and that by such refusal and by statements made by respondent at a meeting of those employees it "did interfere with, restrain and coerce" its employees in the exercise of the rights guaranteed by § 7 of the Act and did engage in unfair labor practices defined by §§ 8 (1) and 8 (5). The usual proceedings and hearings before the Board resulted in findings by the Board to the effect that although respondent had throughout recognized the organization of respondent's editorial room employees and the Guild as their representative, and had met with the Guild representatives whenever requested for the purpose of discussing the employees' demands, it nevertheless had persistently refused to discuss in detail the proposals of the Guild, to make any counter proposals or to enter into any agreement with it, and had not negotiated in good faith in a genuine effort to compose the differences between employer and employees.

The Board found that respondent had refused to bargain as required by § 8 (5) of the Act. It found that respondent had made the statements charged in the complaint at a meeting of its employees and that these statements were an "interference with the Guild's efforts to negotiate." Treating respondent's action in refusing to bargain and in interfering with the bargaining negotiations as an infringement of all the rights guaranteed to the employees by the Act, it found broadly, in the words of the statute, a violation of § 8 (1) which declares that it is an unfair labor practice for the employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in § 7." Section 7 provides: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection."

From all this the Board concluded that the "appropriate remedy" was an order directing respondent "upon request to bargain collectively with the . . . Guild" as the "exclusive representative" of respondent's editorial room employees and "if understandings are reached to embody such understandings in a signed agreement if requested to do so by the Guild." Having provided the recommended remedy by the provisions of its order directing the respondent to bargain and to cease and desist from refusing to bargain the Board went further and ordered broadly that respondent should in effect refrain from violating the Act in any manner whatsoever. This it did by paragraph 1 (b) of the order which directed respondent to cease and desist from "In any manner interfering with, restraining, or coercing its employees in the exercise of their rights to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purposes of collective bargaining or other mutual aid and protection, as guaranteed in Section 7 of the Act."

It is this and the provisions of the order other than that part of it directing respondent to bargain which are the subjects of the present controversy.

Upon petition of the Board to enforce the order, the Court of Appeals for the Fifth Circuit struck from it all the provisions except that which directed respondent to bargain with the Guild on request, and to embody any understanding in a signed agreement. . . .

[The court thereupon proceeded to consider and dispose of certain preliminary objections raised by the respondent. Then it turned to the principal question presented by the record.]

A question of a different nature is presented by Paragraph 1 (b) of the order by which the Board, on the basis of respondent's action in refusing to bargain and its statements interfering with the bargaining negotiations, has directed respondent not to violate "in any manner" the duties imposed on the employer by the statute. Petitioner argues that since respondent's refusal to bargain, which is a violation of § 8 (5), is also a violation of § 8 (1) which in terms incorporates by reference all the rights enumerated in § 7, the Board is not only free to restrain violations like those which respondent has committed, but any other unfair labor practices of any kind which likewise infringe any of the rights enumerated in § 7, however unrelated those practices may be to the acts of respondent which alone emerged in course of the hearing and which the Board has found.

But we think it does not follow that, because the acts of respondent which the Board has found to be an unfair labor practice defined by § 8 (5) are also a technical violation of § 8 (1), the Board, in the circumstances of this case, is justified in making a blanket order restrain-

ing the employer from committing any act in violation of the statute, however unrelated it may be to those charged and found, or that courts are required for the indefinite future to give effect in contempt proceedings to an order of such breadth.

We cannot find such authority or requirement in the carefully chosen language of § 10 (c), which directs the Board to state its findings of fact showing the unfair labor practice charged and to order the person accused to "cease and desist from such unfair labor practice," or in § 10 (e) of the Act which authorizes the court on application of the Board to enter a "decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board." It is obvious that the order of the Board, which when judicially confirmed, the courts may be called on to enforce by contempt proceedings, must, like the injunction order of a court, state with reasonable specificity the acts which the respondent is to do or refrain from doing. It would seem equally clear that the authority conferred on the Board to restrain the practice which it has found the employer to have committed is not an authority to restrain generally all other unlawful practices which it has neither found to have been pursued nor persuasively to be related to the proven unlawful conduct.

Congress has itself afforded a guide pointing to the appropriate limits of the order which the Board is to make in restraining unfair labor practices. By the definition and classification of unfair labor practices in the statute it has shown that they are not always so similar or related that the commission of one necessarily merits or rightly admits of an order restraining all. Here the whole controversy between respondent and the Guild was with respect to the Guild's requests to bargain and respondent's attempt to influence the negotiations and its ultimate refusal to enter into an agreement from all of which the Board inferred the refusal to bargain in good faith. In all other respects respondent has consistently left the Guild and its activities undisturbed. The Board made no finding and there is nothing in the record to suggest that the failure of the bargaining negotiations and all that attended them gave any indication that in the future respondent would engage in all or any of the numerous other unfair labor practices defined by the Act.

Refusal to bargain, defined as an unfair labor practice by § 8 (5), may be, as we think it was here, wholly unrelated to the domination of a labor union or the interference with its formation or administration or financial or other support to it, all of which are defined as unfair labor practices by § 8 (2). Refusal to bargain may be, as we think it was here, wholly unrelated to "discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization," all of which are unfair labor practices as defined by § 8 (3). Here the Board made no finding, based either on the specific circumstances disclosed by the rec-



ord or on its own expert judgment of their relation to the policy embodied in § 7, or as to any relationship or probable relationship of respondent's refusal to bargain and the other types of unfair practices some of which are enumerated in § 8. Yet, if the contention which it makes is to be sustained subsequent violations of § 8 (2) and (3), which are also violations of § 8 (1) may be the subject of a contempt order merely because respondent by the refusal to bargain has violated § 8 (5) which is similarly a violation of § 8 (1).

In view of the authority given to the Board by § 10 (c), carefully restricted to the restraint of such unfair labor practices as the Board has found the employer to have committed, and of the broad language of § 10 (e) authorizing the courts to modify the order of the Board wholly or in part, we can hardly suppose that Congress intended that the Board should make or the court should enforce orders which could not appropriately be made in judicial proceedings. This is the more so because § 10 (a), which authorizes the Board "as hereinafter provided to prevent any person from engaging in any unfair labor practice," specifically directs that "This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise." In the light of these provisions we think that Congress did not contemplate that the courts should, by contempt proceedings, try alleged violations of the National Labor Relations Act not in controversy and not found by the Board and which are not similar or fairly related to the unfair labor practice which the Board has found.

A federal court has broad power to restrain acts which are of the same type or class as unlawful acts which the court has found to have been committed or whose commission in the future unless enjoined, may fairly be anticipated from the defendant's conduct in the past. But the mere fact that a court has found that a defendant has committed an act in violation of a statute does not justify an injunction broadly to obey the statute and thus subject the defendant to contempt proceedings if he shall at any time in the future commit some new violation unlike and unrelated to that with which he was originally charged. This Court will strike from an injunction decree restraints upon the commission of unlawful acts which are thus dissociated from those which a defendant has committed. *Swift & Co. v. United States*, 196 U. S. 375, 25 S. Ct. 276, 49 L. Ed. 518; *New York, New Haven & Hartford R. Co. v. Interstate Commerce Commission*, 200 U. S. 361, 404, 26 S. Ct. 272, 282, 50 L. Ed. 515, and see under the National Labor Relations Act, *National Labor Relations Board v. Swift & Co.*, 7 Cir., 108 F. 2d 988.

It is a salutary principle that when one has been found to have committed acts in violation of a law he may be restrained from committing other related unlawful acts. But we think that without sacrifice of that principle, the National Labor Relations Act does not contemplate

that an employer who has unlawfully refused to bargain with his employees shall for the indefinite future, conduct his labor relations at the peril of a summons for contempt on the Board's allegation, for example, that he has discriminated against a labor union in the discharge of an employee, or because his supervisory employees have advised other employees not to join a union. See e. g., *H. J. Heinz Co. v. National Labor Relations Board*, 311 U. S. 514, 61 S. Ct. 320, 85 L. Ed. 309, decided January 6, 1941.

Having found the acts which constitute the unfair labor practice the Board is free to restrain the practice and other like or related unlawful acts. But as the Court has held in the case of the Federal Trade Commission, see *Federal Trade Commission v. Beech Nut Co.*, supra, 257 U. S. 455, 42 S. Ct. 155, 66 L. Ed. 307, 19 A. L. R. 882, an order not so related should be appropriately restricted on review. The breadth of the order, like the injunction of a court, must depend upon the circumstances of each case, the purpose being to prevent violations, the threat of which in the future is indicated because of their similarity or relation to those unlawful acts which the Board has found to have been committed by the employer in the past. . . . We hold only that the National Labor Relations Act does not give the Board an authority, which courts cannot rightly exercise, to enjoin violations of all the provisions of the statute merely because the violation of one has been found. To justify an order restraining other violations it must appear that they bear some resemblance to that which the employer has committed or that danger of their commission in the future is to be anticipated from the course of his conduct in the past. That justification is lacking here. To require it is no more onerous or embarrassing to the Board than to a court. And since we are in a field where subtleties of conduct may play no small part, it is appropriate to add that an order of the Board, like the injunction of a court, is not to be evaded by indirections or formal observances which in fact defy it. After an order to bargain collectively in good faith, for example, discriminatory discharge of union members may so affect the bargaining process as to establish a violation of the order. . . .

It is ordered.

Reversed.<sup>8</sup>

### Determination of Proper Scope of Order

Should the reviewing court, or the agency, determine what remedy is reasonably necessary or appropriate in the particular case?

In *Phelps Dodge Corp. v. National Labor Relations Board*, 313 U. S. 177, 85 L. Ed. 1271, 61 S. Ct. 845 (1941), the Board, after finding that

<sup>8</sup> Comments on this case may be found in 41 *Columbia L. Rev.* 911 (1941); 39 *Mich. L. Rev.* 1219 (1941); 26 *Wash. Univ. L. Q.* 554 (1941); 29 *Geo. L. Jour.* 1026 (1941).

respondent company had refused to hire two individuals solely because of their affiliation with a labor union, had ordered the company to offer jobs to such individuals. In denying the company's plea that the scope of the order was too broad, the court remarked that Congress could not reasonably be expected to define the whole gamut of remedies to effectuate the policies of the National Labor Relations Act, and that Congress had properly "met these difficulties by leaving the adaptation of means to end to the empiric process of administration." After mentioning various factors that might have been considered in determining what scope the order should have, the Court added: "All these and other factors *outside our domain of experience* may come into play. Their relevance is for the Board, not for us." (Emphasis supplied.)

Why was the question as to the proper scope of the remedy one for the court in *Express Publishing Co.*, but for "the informed discretion of the Board" in the *Phelps Dodge* case?

In *National Labor Relations Board v. Gullett Gin Co., Inc.*, 340 U. S. 361, 95 L. Ed. 337, 71 S. Ct. 337 (1951), the question as to the scope of the Board's order was whether, in ordering reinstatement of certain discharged employees with back pay, the order went too far in declaring that unemployment compensation payments which had been received by the discharged employees should not be deducted in computing the amount of back pay due them. Was this question one for the agency or for the reviewing court?

Suppose the Federal Trade Commission, after finding that respondent had been guilty of price discriminations in a certain part of the country, ordered it to cease such discriminations not only in that area but also in any other part of the country (despite the fact that no evidence had been adduced indicating any likelihood that price discriminations would be utilized in other geographical areas). Do the principles of the *Express Publishing Co.* case require that the reviewing court reduce the scope of the Commission's order? See *E. B. Muller Co. v. Federal Trade Commission* (CCA 6th, 1944), 142 F. (2d) 511.

In *Jacob Siegel Co. v. Federal Trade Commission*, 327 U. S. 608, 90 L. Ed. 888, 66 S. Ct. 758 (1946), *infra*, Ch. IX, the Commission had ordered that respondent discontinue use of the trade name "Alpacuna." On appeal, it was urged that the scope of the order was too broad; that the use of the name should have been permitted with an accompanying explanation designed to eliminate the deception which had been found to inhere in the use of the name without any qualifying explanation (to the effect that "Alpacuna" fabric did not contain vicuna). The court, after noting that the Commission "has wide discretion in its choice of a remedy," and that the power of the reviewing court "extends no further than to ascertain whether the Commission made an allowable judgment in its choice," remanded the case in order that the Commission in "the exercise of an informed, expert judgment" might decide "wheth-

er some change of name short of excision would in the judgment of the Commission be adequate."

Sometimes, indeed, the reviewing court finds that an agency has erred by seeking to permit the court to determine the proper sweep of an order. Thus, in *Federal Trade Commission v. Morton Salt Co.*, 334 U. S. 37, 92 L. Ed. 1196, 68 S. Ct. 822 (1948) the Commission, after finding the respondent guilty of price discriminations, entered an order generally forbidding such discrimination but containing a proviso that the order did not prevent respondent from making price differences of less than 5¢ per case of salt where such difference did not tend to injure competition between customers. This was error, ruled the court, because it had the effect of shifting to the courts the responsibility of determining, in enforcement proceedings, whether a difference of less than five cents would injure competition. Such issues should be determined initially by the Commission, it was held, and not left for the courts to decide.

Error is committed if an agency order is either too broad or too narrow in scope; the agency must not go too far, neither must it decline to go far enough.<sup>9</sup> *Quaere*: Who should decide what order is appropriate under all the circumstances? Should it be said that the scope of the order is for the agency, except in those cases where the court feels the agency's determination is unreasonable?<sup>10</sup> Possibly some help in answering these questions may be derived from the next case.

**Federal Trade Commission v. Ruberoid Co., Supreme Court of the United States, 1952. 343 U. S. 470, 96 L. Ed. 1081, 72 S. Ct. 800.**

MR. JUSTICE CLARK delivered the opinion of the court.

In this case we granted cross-petitions for certiorari to review the decree of the Court of Appeals affirming, but refusing to enforce, a cease and desist order issued by the Federal Trade Commission to the Ruberoid Co.

Ruberoid is one of the nation's largest manufacturers of asphalt and asbestos roofing materials and allied products. The Commission found that Ruberoid, in a number of specific instances, had discriminated among customers in the prices charged them for roofing materials. Further finding that the effect of those discriminations "may be substantially to lessen competition in the line of commerce in which [those customers] are engaged, and to injure, destroy, or prevent competition between [those customers]," the Commission held that the discrimina-

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<sup>9</sup> For an example of the difficulties encountered, see "Administrative Enforcement of the Lottery Broadcast Provision," 58 Yale L. Jour. 1093 (1949).

<sup>10</sup> It has been suggested that administrative officers should be freed of legislative as well as judicial control. For a discussion of some of the problems arising in this area, see Newman and Keaton, "Congress and the Faithful Execution of Laws—Should Legislators Supervise Administrators?" 41 Calif. L. Rev. 565 (1953).

tions were violations of § 2 (a) of the Clayton Act, as amended by the Robinson-Patman Act. 46 F.T.C. 379. Ruberoid was ordered to:

"[C]ease and desist from discriminating in price:

"By selling such products of like grade and quality to any purchaser at prices lower than those granted other purchasers who in fact compete with the favored purchaser in the resale or distribution of such products."

Upon Ruberoid's petition for review, the Court of Appeals affirmed and granted enforcement of the order. 189 F. (2d) 893. However, on rehearing, the Court of Appeals amended its mandate to strike that part which directed enforcement. 191 F. (2d) 294. We granted certiorari to review questions, important in the administration of the Clayton Act, as to the scope and enforcement of Federal Trade Commission orders. 342 U. S. 917, 96 L. Ed. 686, 72 S. Ct. 365.

We first consider the contentions of Ruberoid, which are mainly attacks upon the breadth of the order. Orders of the Federal Trade Commission are not intended to impose criminal punishment or exact compensatory damages for past acts, but to prevent illegal practices in the future. In carrying out this function the Commission is not limited to prohibiting the illegal practice in the precise form in which it is found to have existed in the past. If the Commission is to attain the objectives Congress envisioned, it cannot be required to confine its road block to the narrow lane the transgressor has traveled; it must be allowed effectively to close all roads to the prohibited goal, so that its order may not be by-passed with impunity. Moreover, "[t]he Commission has wide discretion in its choice of a remedy deemed adequate to cope with the unlawful practices" disclosed. *Jacob Siegel Co. v. Federal Trade Commission*, 327 U. S. 608, 611 (1946). Congress placed the primary responsibility for fashioning such orders upon the Commission, and Congress expected the Commission to exercise a special competence in formulating remedies to deal with problems in the general sphere of competitive practices. Therefore we have said that "the courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist." *Id.* 327 U. S. at 613.

In the light of these principles, we examine the specific objections of Ruberoid to the order in this case. First, it is argued that the order went too far in prohibiting all price differentials between competing purchasers, although only differentials of 5% or more were found. But the Commission found that very small differences in price were material factors in competition among Ruberoid's customers, and Ruberoid offered no evidence to the contrary. In this state of the record the Commission was not required to limit its prohibition to the specific differential shown to have been adopted in past violations of the statute. In the absence of any indication that a lesser discrimination might not affect competition there was no need to afford an escape clause through which

the seller might frustrate the whole purpose of the proceedings and the order by limiting future discrimination to something less than 5%.

The roofing material customers of Ruberoid may be classified as wholesalers, retailers, and roofing contractors or applicators. The discriminations found by the Commission were in sales to retailers and applicators. The Commission held that there was insufficient evidence in the record to establish discrimination among wholesalers, as such. Ruberoid contends that the order should have been similarly limited to sales to retailers and applicators. But there was ample evidence that Ruberoid's classification of its customers did not follow real functional differences. Thus some purchasers which Ruberoid designated as "wholesalers" and to which Ruberoid allowed extra discounts in fact competed with other purchasers as applicators. And the Commission found that some purchasers operated as both wholesalers and applicators. So finding, the Commission disregarded these ambiguous labels, which might be used to cloak discriminatory discounts to favored customers, and stated its order in terms of "purchasers who in fact compete." Thus stated, we think the order is understandable, reasonably related to the facts shown by the evidence and within the broad discretion which the Commission possesses in determining remedies.

Finally, Ruberoid complains that the order enjoins lawful acts by failing to except from its prohibitions differentials which merely make allowance for differences in cost of manufacture, sale or delivery, or which are made in good faith to meet an equally low price of a competitor. Differences in price satisfying either of these tests are permitted by the terms of the Act. It is argued that the Commission has radically broadened its prohibitory powers through failure to include these provisos in the order. We do not think so because we think the provisos are necessarily implicit in every order issued under the authority of the Act, just as if the order set them out *in extenso*. Although previous Commission orders have included these provisos, they gained no force by that inclusion. Their absence cannot preclude the seller from differentiating in price in a new competitive situation involving different circumstances where it can justify the discrimination in accordance with the statutory provisos. Nor is the seller required to seek modification of the order each time, for example, that a competitor's price reduction requires it either to lower its price in good faith to meet the lower competing price or to lose a fleeting sales opportunity. On the other hand, the implied inclusion of the provisos in the order does not shift from the seller the burden of proof of justification. Neither does recognition of the implicit availability of these defenses allow the seller to relitigate issues already settled by prior proceedings before the Commission which resulted in an order that was affirmed in the courts. If questions of justification, claimed upon the basis of facts relating to costs or meeting competition, have once been finally decided against the

seller, it cannot again interpose the same defense upon substantially similar facts when the Commission seeks to show that its order has been violated. The same result follows where the evidence supporting the defense, although not produced in the previous proceedings, was then available to the seller. In short, the seller, in contesting enforcement or contempt proceedings, may plead only those facts constituting statutory justification which it has not had a previous opportunity to present.

Mr. JUSTICE BLACK concurs in the judgment and opinion of the Court, except that he thinks the Commission's order should expressly except from its prohibitions differentials which merely make allowances for differences in the cost of manufacture, sale, or delivery, or which are made in good faith to meet an equally low price of a competitor.

Mr. JUSTICE JACKSON, dissenting. . . .

The Federal Trade Commission, in July of 1943, instituted before itself a proceeding against petitioner on a charge of discriminating in price between customers in violation of subsection (a) of § 2 of the Clayton Act as amended by the Robinson-Patman Act, approved June 19, 1936, 15 USC § 13 (a).

Several violations were proved and admitted to have occurred in 1941. No serious opposition was offered to an order to cease and desist from such discriminations, but petitioner did object to being ordered to cease types of violations it never had begun and asked that any order include a clause to the effect that it did not forbid the price differentials between customers which are expressly allowed by statute.

However, the Commission refused to include such a provision as "unnecessary to assure respondent [petitioner here] its full legal rights." It also rejected the specific and limited order recommended by its Examiner and substituted a sweeping general order to "cease and desist from discriminating in price: By selling such products of like grade and quality to any purchaser at prices lower than those granted other purchasers who in fact compete with the favored purchaser in the resale or distribution of such products." It wrote no opinion and gave only the most cryptic reasons in its findings.

On proceedings for review, petitioner attacked this order for its indeterminateness and its prohibition of differentials allowed by statute. The Court of Appeals, however, affirmed, saying:

"We sympathize with the petitioner's position and can realize the difficulties of conducting business under such general prohibitions. Nevertheless we are convinced that the cause of the trouble is the Act itself, which is vague and general in its wording and which cannot be translated with assurance into any detailed set of guiding yardsticks."

This appraisal of the result of almost ten years of litigation exposes a grave deficiency either in the Act itself or in the administrative

process by which it has been applied. Admitting that the statute is "vague and general in its wording," it does not follow that a cease and desist order implementing it should be. I think such an outcome of administrative proceedings is not acceptable. We would rectify and advance the administrative process, which has become an indispensable adjunct to modern government, by returning this case to the Commission to perform its most useful function in administering an admittedly complicated Act.

. . . No doubt it is administratively convenient to blanket an industry under a comprehensive prohibition in bulk—an indiscriminating prohibition of discrimination. But this not only fails to give the precision and concreteness of legal duties to the abstract policies of the Act, it really promulgates an inaccurate partial paraphrase of its indeterminate generalities. Instead of completing the legislation by an order which will clarify the petitioner's duty, it confounds confusion by literally ordering it to cease what the statute permits it to do.

This Court and the court below defer solution of the problems inherent in such an order, on the theory that if petitioner offends again there may be an enforcement order, and if it then offends again there may be a contempt proceeding and that will be time enough for the court to decide what the order against the background of the Act really means. While I think this less than justice, I am not greatly concerned about what the Court's decision does to this individual petitioner, for whom I foresee no danger more serious than endless litigation. But I am concerned about what it does to administrative law.

To leave definition of the duties created by an order to a contempt proceeding is for the courts to end where they should begin. Injunctions are issued to be obeyed, even when justification to issue them may be debatable. *United States v. United Mine Workers*, 330 U. S. 258, 289 et seq., 307. But in this case issues that seem far from frivolous as to what is forbidden are reserved for determination when punishment for disobedience is sought. The Court holds that some modifications are "implicit" in this order. Why should they not be made explicit? Why approve an order whose literal terms we know go beyond the authorization, on the theory that its excesses may be retracted if ever it needs enforcement? Why invite judicial indulgence toward violation by failure to be specific, positive and concrete?

It does not impress me as lawyerly practice to leave to a contempt proceeding the clarification of the reciprocal effects of this Act and order, and determination of the effect of statutory provisos which are then to be read into the order. The courts cannot and should not assume that function. It is, by our own doctrine, a legislative or "quasi-legislative" function, and the courts cannot take over the discretionary functions of the Commission which should enter into its determinations.



Plainly this order is not in shape to enforce and does not become so by the Court's affirmance.

This proceeding should be remanded to the Commission with directions to make its order specific and concrete, to specify the types of discount which are forbidden and reserve to petitioner the rights which the statute allows it, unless they are deemed lost, forfeited or impaired by the violations, in which case any limitation should be set forth. . . .

## SECTION 4. MANNER OF ENFORCEMENT OF RULES AND ORDERS

### Statutory Provisions Concerning Enforcement

Some administrative orders are self-executing. Orders coupled with licensing powers may be enforced by revocation or suspension of the licenses. In tax cases enforcement by use of the executive process of distraint is of long standing and is acceptable. *Phillips v. Commissioner of Internal Revenue*, 283 U. S. 589, 75 L. Ed. 1289, 51 S. Ct. 608 (1931). The executive distress warrant has also been used in a few other instances. For an example see *Murray's Lessee v. Hoboken Land and Improvement Co.*, 18 How. (U. S.) 272 (1855). Aliens are deported upon warrants issued by administrative officers. *Van Vleck*, "The Administrative Control of Aliens," chapter IV. See also *Oceanic Steam Nav. Co., Ltd. v. Stranahan*, 214 U. S. 320, 53 L. Ed. 1013, 29 S. Ct. 671 (1909).

However, a wide variety of administrative orders require supplementary judicial procedures as a means of enforcement. This is true of money judgments, cease and desist orders, rate orders and various other administrative orders of a mandatory character. The enforcement provisions of the New York Public Service Commission Law (N. Y. Consol. L. ch. 48) and the New York Workmen's Compensation Law (N. Y. Consol. L. ch. 67) set up procedures which are typical. They are as follows:

#### New York Public Service Commission Law—Enforcement Provisions.

*Sec. 73. Forfeiture for noncompliance with order.* Every gas corporation and electrical corporation and the officers, agents and employees thereof shall obey, observe and comply with every order made by the commission under authority of this chapter so long as the same shall be and remain in force. Any such person or corporation, or any officer, agent or employee thereof, who knowingly fails or neglects to obey or comply with such order, or any provision of this chapter, shall forfeit to the state of New York not to exceed the sum of one thousand dollars for each offense. Every distinct violation of any such order

or of this chapter shall be a separate and distinct offense, and in case of a continuing violation each day shall be deemed a separate and distinct offense.

*Sec. 74. Summary proceedings.* Whenever the commission shall be of opinion that a gas corporation, electrical corporation or municipality is failing or omitting or about to fail or omit to do anything required of it by law or by order of the commission or is doing anything or about to do anything or permitting anything or about to permit anything to be done, contrary to or in violation of law or of any order of the commission, it shall direct counsel to the commission to commence an action or proceeding in the supreme court of the state of New York in the name of the commission for the purpose of having such violations or threatened violations stopped and prevented either by mandamus or injunction. Counsel to the commission shall thereupon begin such action or proceeding by a petition to the supreme court alleging the violation complained of and praying for appropriate relief by way of mandamus or injunction. It shall thereupon be the duty of the court to specify the time not exceeding twenty days after service of a copy of the petition within which the gas corporation, electrical corporation or municipality complained of must answer the petition. In case of default in answer or after answer, the court shall immediately inquire into the facts and circumstances in such manner as the court shall direct without other or formal pleadings, and without respect to any technical requirement. Such other persons or corporations, as it shall seem to the court necessary or proper to join as parties in order to make its order, judgment or writs effective, may be joined as parties upon application of counsel to the commission. The final judgment in any such action or proceeding shall either dismiss the action or proceeding or direct that a writ of mandamus or an injunction or both issue as prayed for in the petition or in such modified or other form as the court may determine will afford appropriate relief.

#### **New York Workmen's Compensation Law—Enforcement Provisions.**

*Sec. 26. Enforcement of payment in default.* In case of default by the employer in the payment of any compensation due under an award for the period of thirty days after payment is due and payable, or, where the employer has failed to secure the payment of compensation to his employees as required by section fifty hereof where there is such default in payment for a period of ten days after same is due, any party in interest may file with the county clerk for the county in which the injury occurred or the county in which the employer has his principal place of business, a certified copy of the decision of the state industrial board awarding compensation or ending, diminishing or increasing compensation previously awarded, from which no appeal has been taken within the time allowed therefor, or if an appeal has been taken by an employer who has not complied with the provisions of section fifty hereof, where he fails to deposit with the commissioner the amount of the award as security for its payment within ten days after the same is due and payable, and thereupon judgment must be entered in the supreme court by the clerk of such county in conformity therewith immediately upon the filing of such decision. If the payment in default be an instalment, the commissioner may declare the entire award due and judgment may be entered in accordance with the provisions of this section. Such judgment shall be entered in the

same manner, have the same effect and be subject to the same proceedings as though rendered in a suit duly heard and determined by the supreme court, except that no appeal may be taken therefrom. The court shall vacate or modify such judgment to conform to any later award or decision of the board upon presentation of a certified copy of such award or decision. The award may be so compromised by the board as in the discretion of the board may best serve the interest of the persons entitled to receive the compensation or benefits. Neither the commissioner nor any party in interest shall be required to pay any fee to any public officer for filing or recording any paper or instrument or for issuing a transcript of any judgment executed in pursuance of this section.<sup>11</sup>

### **Enforcement by Publicity Measures.**

Under some circumstances the giving of publicity to the acts of persons violating the law or the rules or regulations of the administrative tribunal may prove to be a remarkably effective means of enforcing the law or of accomplishing the desired ends. For example, see the powers given the Securities and Exchange Commission by section 21 (a) of the Securities and Exchange Act of 1934, as follows:

"The Commission may, in its discretion, make such investigations as it deems necessary to determine whether any person has violated or is about to violate any provision of this title or any rule or regulation thereunder, and may require or permit any person to file with it a statement in writing, under oath or otherwise as the Commission shall determine, as to all the facts and circumstances concerning the matter to be investigated. The Commission is authorized, in its discretion, to publish information concerning any such violations, and to investigate any facts, conditions, practices, or matters which it may deem necessary or proper to aid in the enforcement of the provisions of this title. . . ."

Other sections of the same act give the Commission further powers of a similar nature. Pursuant to section 12 of the Act no security may be sold on a licensed exchange unless it is registered with the Commission, and the application for registration must contain such information concerning the person issuing the securities as the Commission may require. By section 13, the Commission is also authorized to require the filing of information, documents and reports by the dealers on securities exchanges to the extent necessary for the proper protection of public interests. Then section 24 provides as follows:

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<sup>11</sup> Occasionally some litigant questions the constitutionality of using the court machinery to enforce an administrative award of money damages without affording to the court the opportunity to question the merits of the award. However, the statutes, so providing, seem to be uniformly upheld—usually without any consideration of the constitutional point. See *Richmond Cedar Works v. Harper*, 129 Va. 481, 106 S. E. 516 (1921); *Palmer v. Finch*, 122 Kan. 825, 253 Pac. 583 (1927); *In re Opinion of the Justices*, 251 Mass. 569, 147 N. E. 681 (1925).

"(a) Nothing in this title shall be construed to require, or to authorize the Commission to require, the revealing of trade secrets or processes in any application, report or document filed with the Commission under this title.

"(b) Any person filing any such application, report or document may make written objection to the public disclosure of information contained therein, stating the grounds for such objection, and the Commission is authorized to hear objections in any such case where it deems it desirable. The Commission may, in such cases, make available to the public the information contained in any such application, report or document only when in its judgment a disclosure of such information is in the public interest; and copies of information so made available may be furnished to any person at such reasonable charge and under such reasonable limitations as the Commission may prescribe."

### Excessive Penalties

**Ex Parte Young, Supreme Court of the United States, 1908. 209 U. S. 123, 52 L. Ed. 714, 28 S. Ct. 441.**

The bill alleged that the orders of the Commission of September, 1906, and May, 1907, and the acts of April 4, 1907, and April 18, 1907, were, in the penalties prescribed for their violation, so drastic that no owner or operator of a railway property could invoke the jurisdiction of any court to test the validity thereof, except at the risk of confiscation of its property, and the imprisonment for long terms in jails and penitentiaries of its officers, agents and employees. For this reason the complainants alleged that the above-mentioned orders and acts, and each of them, denied to the defendant railway company and its stockholders, including the complainants, the equal protection of the laws, and deprived it and them of their property without due process of law, and that each of them was, for that reason, unconstitutional and void.

Mr. JUSTICE PECKHAM, after making the foregoing statement, delivered the opinion of the court. . . .

Coming to the inquiry regarding the alleged invalidity of these acts, we take up the contention that they are invalid on their face, on account of the penalties. For disobedience to the freight act the officers, directors, agents and employees of the company are made guilty of a misdemeanor, and upon conviction each may be punished by imprisonment in the county jail for a period not exceeding ninety days. Each violation would be a separate offense, and, therefore, might result in imprisonment of the various agents of the company who would dare disobey for a term of ninety days each for each offense. Disobedience to the passenger rate act renders the party guilty of a felony and subject to a fine not exceeding five thousand dollars or imprisonment in the state prison for a period not exceeding five years, or both fine and imprisonment. The sale of each ticket above the price permitted by the act would be a violation thereof. It would be difficult, if not impossible,

for the company to obtain officers, agents or employees willing to carry on its affairs except in obedience to the act and orders in question. The company itself would also, in case of disobedience, be liable to the immense fines provided for in violating orders of the Commission. The company, in order to test the validity of the acts, must find some agent or employee to disobey them at the risk stated. The necessary effect and result of such legislation must be to preclude a resort to the courts (either state or federal) for the purpose of testing its validity. The officers and employees could not be expected to disobey any of the provisions of the acts or orders at the risk of such fines and penalties being imposed upon them, in case the court should decide that the law was valid. The result would be a denial of any hearing to the company. The observations upon a similar question made by Mr. JUSTICE BREWER in *Cotting v. Kansas City Stock Yards Co.*, 183 U. S. 79, 99, 100, 102, are very apt. At page 100 he stated: "Do the laws secure to an individual an equal protection when he is allowed to come into court and make his claim or defense subject to the condition that upon a failure to make good that claim or defense the penalty for such failure either appropriates all his property or subjects him to extravagant and unreasonable loss?" Again, at page 102, he says: "It is doubtless true that the State may impose penalties, such as will tend to compel obedience to its mandates by all, individuals or corporations, and if extreme and cumulative penalties are imposed only after there has been a final determination of the validity of the statute, the question would be very different from that here presented. But when the legislature, in an effort to prevent any inquiry of the validity of a particular statute, so burdens any challenge thereof in the courts that the party affected is necessarily constrained to submit rather than take the chances of the penalties imposed then it becomes a serious question whether the party is not deprived of the equal protection of the laws." The question was not decided in that case, as it went off on another ground. We have the same question now before us, only the penalties are more severe in the way of fines, to which is added, in the case of officers, agents or employees of the company, the risk of imprisonment for years as a common felon. See also *Mercantile Trust Co. v. Texas & P. R. Co.*, 51 Fed. 529, 543; *Louisville & N. R. Co. v. McChord*, 103 Fed. 216, 223; *Consolidated Gas Co. v. Mayer*, 146 Fed. 150, 153. In *McGahey v. Virginia*, 135 U. S. 662, 694, it was held that to provide a different remedy to enforce a contract, which is unreasonable, and which imposes conditions not existing when the contract was made, was to offer no remedy, and when the remedy is so onerous and impracticable as to substantially give none at all the law is invalid, although what is termed a remedy is in fact given. See also *Bronson v. Kinzie*, 1 How. 311, 317; *Seibert v. Lewis*, 122 U. S. 284. If the law be such as to make the decision of the legislature or of a commission conclusive as to the sufficiency of the rates

this court has held such a law to be unconstitutional. *Chicago, M. & St. P. R. Co. v. Minnesota*, 134 U. S. 418. A law which indirectly accomplishes a like result by imposing such conditions upon the right to appeal for judicial relief as works an abandonment of the right rather than face the conditions upon which it is offered or may be obtained, is also unconstitutional. It may therefore be said that when the penalties for disobedience are by fines so enormous and imprisonment so severe as to intimidate the company and its officers from resorting to the courts to test the validity of the legislation, the result is the same as if the law in terms prohibited the company from seeking judicial construction of laws which deeply affect its rights.

It is urged that there is no principle upon which to base the claim that a person is entitled to disobey a statute at once, for the purpose of testing its validity without subjecting himself to the penalties for disobedience provided by the statute in case it is valid. This is not an accurate statement of the case. Ordinarily a law creating offenses in the nature of misdemeanors or felonies relates to a subject over which the jurisdiction of the legislature is complete in any event. In the case, however, of the establishment of certain rates without any hearing, the validity of such rates necessarily depends upon whether they are high enough to permit at least some return upon the investment (how much it is not now necessary to state), and an inquiry as to that fact is a proper subject of judicial investigation. If it turns out that the rates are too low for that purpose, then they are illegal. Now, to impose upon a party interested the burden of obtaining a judicial decision of such a question (no prior hearing having ever been given) only upon the condition that if unsuccessful he must suffer imprisonment and pay fines as provided in these acts, is, in effect, to close up all approaches to the courts, and thus prevent any hearing upon the question whether the rates as provided by the acts are not too low, and therefore invalid. The distinction is obvious between a case where the validity of the act depends upon the existence of a fact which can be determined only after investigation of a very complicated and technical character, and the ordinary case of a statute upon a subject requiring no such investigation and over which the jurisdiction of the legislature is complete in any event.

We hold, therefore, that the provisions of the acts relating to the enforcement of the rates, either for freight or passengers, by imposing such enormous fines and possible imprisonment as a result of an unsuccessful effort to test the validity of the laws themselves, are unconstitutional on their face, without regard to the question of the insufficiency of those rates. . . .<sup>12</sup>

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<sup>12</sup> Compare with the principal case the case of *United States v. Clyde S. S. Co.*, 36 F. (2d) 691 (1929), in which a penalty of \$500 per day for refusal to

# SECTION 5. APPLICATION OF THE DOCTRINE OF RES JUDICATA TO ADMINISTRATIVE ORDERS

**Arizona Grocery Co. v. Atchison, Topeka & Santa Fe Ry. Co.,** Supreme Court of the United States, 1932. 284 U. S. 370, 76 L. Ed. 348, 52 S. Ct. 183.

MR. JUSTICE ROBERTS delivered the opinion of the court.

This case turns upon the power of the Interstate Commerce Commission to award reparations with respect to shipments which moved under rates approved or prescribed by it.

disclose books and records was held to be not a violation of the Fourteenth Amendment.

In *Bartlett Frazier Co. v. Hyde*, 65 F. (2d) 350 (1933), the plaintiff contended, among other things, that the Grain Futures Act of September 21, 1922, c. 369, 42 Stat. 998 (7 USCA 1-17) was unconstitutional because no provision was made for testing the validity of orders, regulations or requirements of the act, except under harsh and confiscatory penalties. The act provides in section 6 that it shall be unlawful for any person to transmit in interstate commerce by mail, telephone or telegraph "any offer to make or execute, or any confirmation of the execution of, any contract of sale of grain for future delivery on or subject to the rules of any board of trade in the United States, or for any person to make or execute such contract of sale which is or may be used for (a) hedging any transaction in interstate commerce in grain or the products or by-products thereof, or (b) determining the price basis of any such transaction in interstate commerce, or (c) delivering grain sold, shipped or received in interstate commerce for the fulfillment thereof," except where the dealer is the actual owner or grower of the property sold, or when the contract is made in writing by or through a member of a board of trade designated by the Secretary of Agriculture as a "contract market." It is further provided that no board of trade shall be approved as a contract market unless, along with other requirements, the board provides for the making of such reports and submitting to such inspection as the Secretary of Agriculture shall direct, both as to the board itself and as to its members.

Section 13 of the act, the penalty section, provides that "any person who shall violate the provisions of section 6 of this chapter, or who shall fail to evidence any contract mentioned in said section by a record in writing as therein required, or who shall knowingly or carelessly deliver for transmission through the mails or in interstate commerce by telegraph, telephone, wireless or other means of communication false or misleading or knowingly inaccurate reports concerning crop or market information or conditions that affect the price of grain in interstate commerce, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, be fined not more than \$10,000 or imprisoned for not more than one year, or both, together with costs of prosecution."

Plaintiff relied upon *Ex parte Young*, and also upon *Missouri Pacific Ry. Co. v. Tucker*, 230 U. S. 340, 57 L. Ed. 1507, 33 S. Ct. 961 (1913), and *Oklahoma Operating Co. v. Love*, 252 U. S. 331, 64 L. Ed. 596, 40 S. Ct. 338 (1920), which asserted the same principle. Is this principle applicable to the penalty provisions of the Grain Futures Act?

Professor Rottschaefer, in "American Constitutional Law" (West Publishing Co., 1939) p. 849, observes: "Due process also prohibits so burdening the



The respondent carriers maintained a rate of \$1.045 per hundred pounds for shipment of sugar from California points to Phoenix, Arizona. On complaint of petitioner and others, the Commission, after hearing, on June 22, 1921, found that the rate attacked had been, then was, and for the future would be, unreasonable to the extent that it exceeded 96.5 cents, and ordered the establishment of a rate not exceeding that figure. September 17, 1921, the carriers promulgated a rate

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exercise of the rights thus conferred as to practically force those entitled thereto to forego them as the lesser of two evils. A common method of doing this is to impose penalties for violations of legislation or of administrative orders that are so severe that they 'might well deter even the boldest and most confident' from appealing to the courts for the protection of their rights. This does not prevent government from imposing heavy penalties in such cases under all circumstances, but means only that it may not do so unless adequate opportunity is afforded for procuring the judicial determinations with respect to a given matter to which due process entitles a party. This principle has been invoked most frequently in connection with attempts of the states to prevent the judicial review of the issue whether rates established under their authority were confiscatory. A procedural arrangement under which this issue could be judicially tried only in contempt proceedings for violating a rate order, each separate violation of which entailed liability for a heavy penalty, has been held to deny due process. It has also been in connection with state regulation of public utility rates and practices that statutes have been enacted which, while providing for the judicial review of administrative orders, prohibited the introduction in the judicial proceedings of evidence other than that submitted in the proceedings before the board that eventuated in the order under review. This was held not to deny due process where the utility company was definitely informed in the administrative proceedings of the order asked for and finally entered against it, and was given ample opportunity to be heard, including the benefit of compulsory process for obtaining witnesses. It is clear from the opinion in the case last cited that due process would be violated by such statute if the defendant in the administrative proceedings were denied a full and fair hearing before the board on every matter of fact on which the validity of the order entered against it depended, and might be deemed violated if it operated to exclude newly discovered relevant evidence. The order involved in that case required defendant to make a track connection with other railroads. How far the same principles would apply to rate orders or other orders cannot be definitely stated. In a case involving an order of the Interstate Commerce Commission prescribing a division of a through rate among the participating carriers the order was assailed by some of them as confiscatory. The court reviewing said order permitted the carrier to introduce evidence in addition to that which had been presented before the Commission. The Supreme Court denied the government's contention that this was error by an argument that is ultimately based on the theory that the protesting carrier was entitled by due process to do so, since due process assures a full hearing before the court or other tribunal empowered to perform the judicial function involved, which, in this case, was the decision of the constitutionality of the order. This theory may require some limitation of the principle on which the earlier decision was based to cases in which the issue is not one involving the defendant's constitutional property or personal rights. The earlier case, however, also involved an issue of the defendant's constitutional property rights."



of 96 cents, which they later voluntarily reduced to 86.5 cents. November 3, 1922, certain of the complainants in the earlier proceeding, other than petitioner, filed a new petition attacking the current rate. While this case was pending, the carriers, on January 10, 1924, again made a voluntary reduction to 84 cents. February 25, 1925, the Commission filed a report prescribing for the future a maximum reasonable rate of 71 cents, to that extent modifying its earlier order. Reparation was found to be due shippers under the old rate, but none was awarded. February 8, 1927, the second case was reopened for further consideration, but the 71 cent rate was not disturbed. In a later proceeding, with which petitioner's and other claims for reparation were consolidated, the Commission found that the rates to Phoenix from and after July 1, 1922, had been unreasonable to the extent they had exceeded 73 cents from Northern California and 71 cents from Southern California; prescribed rates for the future from those origins to Phoenix and other Arizona destinations, and awarded petitioner and other shippers reparation in the amounts by which the rates paid (86.5 and 84 cents) exceeded those (73 and 71 cents) found to have been the reasonable rates during the period since July 1, 1922.

The date of the first shipment made by petitioner on which reparation was awarded was February 21, 1923, and of the last February 5, 1925, so that all were made between the effective dates of the first and second orders above mentioned.

The respondents objected that they should not be required to pay reparations on shipments which moved under rates approved or prescribed by the Commission as reasonable. To this that body replied, "We reserve the right, upon a more comprehensive record, to modify our previous findings, upon matters directly in issue before us as to which it clearly appears that our previous findings would not accord substantial justice under the laws which we administer. We have such a case here. For the first time the record before us is comprehensive in the evidence which it contains upon the reasonableness of the rates assailed. Upon this record we reach the conclusion that the rate prescribed in the first Phoenix case, during the period embraced in these complaints, was unreasonable and that a lower rate would have been reasonable during that period. If we are within our authority in finding that a lower rate would have been reasonable, then it must follow that shippers who paid the freight charges at the higher rate paid charges which were unreasonable, and are entitled to reparation. . . ."

The carriers having failed to pay the amount awarded, the petitioner sued therefor in the District Court, and recovered judgment. The Circuit Court of Appeals reserved, and entered judgment for respondents. This Court granted certiorari. Whether, as the petitioner argues, the Commission correctly construed its authority, is to be determined by examination of the legislation defining its powers.

The exaction of unreasonable rates by a public carrier was forbidden by the common law. *Interstate Commerce Com. v. Baltimore & O. R. Co.*, 145 U. S. 263, 275. The public policy which underlay this rule could, however, be vindicated only in an action brought by him who paid the excessive charge, to recover damages thus sustained. Rates, fares, and charges were fixed by the carrier, which took its chances that in an action by the shipper these might be adjudged unreasonable and reparation be awarded.

But we are here specially concerned with the Interstate Commerce Act of 1887 and with some of the changes or supplements adopted since its original enactment. That Act did not take from the carriers their power to initiate rates—that is, the power in the first instance to fix rates, or to increase or to reduce them. *Skinner & Eddy Corp. v. United States*, 249 U. S. 557, 564; *Cincinnati, N. O. & T. P. R. Co. v. Interstate Commerce Com.*, 162 U. S. 184, 197. In order to render rates definite and certain, and to prevent discrimination and other abuses, the statute required the filing and publishing of tariffs specifying the rates adopted by the carrier, and made these the *legal* rates, that is, those which must be charged to all shippers alike. Any deviation from the published rate was declared a criminal offense, and also a civil wrong giving rise to an action for damages by the injured shipper. Although the Act thus created a legal rate, it did not abrogate, but expressly affirmed, the common-law duty to charge no more than a reasonable rate, and left upon the carrier the burden of conforming its charges to that standard. In other words, the legal rate was not made by the statute a lawful rate—it was lawful only if it was reasonable. Under § 6 the shipper was bound to pay the legal rate; but if he could show that it was unreasonable he might recover reparation.

The Act altered the common law by lodging in the Commission the power theretofore exercised by courts, of determining the reasonableness of a published rate. If the finding on this question was against the carrier, reparation was to be awarded the shipper, and only the enforcement of the award was relegated to the courts. In passing upon the issue of fact the function of the Commission was judicial in character; its action affected only the past, so far as any remedy of the shipper was concerned, and adjudged for the present merely that the rate was then unreasonable; no authority was granted to prescribe rates to be charged in the future. Indeed, after a finding that an existing rate was unreasonable, the carrier might put into effect a new and slightly different rate and compel the shipper to resort to a new proceeding to have this declared unreasonable. Since the carrier had complete liberty of action in making the rate, it necessarily followed that upon a finding of unreasonableness, an award of reparation should be measured by the excess paid, subject only to statutory limitations of time.

Under the Act of 1887 the Commission was without power either to prescribe a given rate thereafter to be charged (*Interstate Commerce Com. v. Cincinnati, N. O. & T. P. Ry. Co.*, 167 U. S. 479), or to set a maximum rate for the future (*Cincinnati, N. O. & T. P. Ry. Co. v. Interstate Commerce Com.*, *supra*, p. 196), for the reason that so to do would be to exercise a legislative function not delegated to that body by the statute.

The Hepburn Act and the Transportation Act evince an enlarged and different policy on the part of Congress. The first granted the Commission power to fix the maximum reasonable rate; the second extended its authority to the prescription of a named rate, or the maximum or minimum reasonable rate, or the maximum and minimum limits within which the carriers' published rate must come. When under this mandate the Commission declares a specific rate to be the reasonable and lawful rate for the future, it speaks as the legislature, and its pronouncement has the force of a statute. This court has repeatedly so held with respect to the fixing of specific rates by state commissions; and in this respect there is no difference between authority delegated by state legislation and that conferred by Congressional action.

But it is suggested that the mere setting of limits by Commission order leaves the carrier free to name any rate within those limits, and, as at common law, it must at its peril publish a reasonable rate within the boundaries set by the order; that as it has the initiative it must take the burden, notwithstanding the Commission's order, of maintaining the rate at a reasonable level, and will be answerable in damages if it fails so to do. This argument overlooks the fact that in declaring a maximum rate the Commission is exercising a delegated power legislative in character; that it may act only within the scope of the delegation; that its authority is to fix a maximum or minimum *reasonable* rate; for it is precluded by the statute from fixing one which is unreasonable, which by the statute is declared unlawful. If it were avowedly to attempt to set an unreasonably high maximum its order would be a nullity.

The report and order of 1921 involved in the present case declared in terms that 96.5 cents was, and for the future would be, a reasonable rate. There can be no question that when the carriers, pursuant to that finding, published a rate of 96 cents, the legal rate thus established, to which they and the shipper were bound to conform, became by virtue of the Commission's order also a lawful—that is, a reasonable—rate.

Specific rates prescribed for the future take the place of the legal tariff rates theretofore in force by the voluntary action of the carriers, and themselves become the legal rates. As to such rates there is therefore no difference between the legal or published tariff rate and the lawful rate. The carrier cannot change a rate so prescribed and take its chances of an adjudication that the substituted rate will be found

reasonable. It is bound to conform to the order of the Commission. If that body sets too low a rate, the carrier has no redress save a new hearing and the fixing of a more adequate rate for the future. It cannot have reparation from the shippers for a rate collected under the order upon the ground that it was unreasonably low. This is true because the Commission, in naming the rate, speaks in its *quasi*-legislative capacity. The prescription of a maximum rate, or maximum and minimum rates, is as legislative in quality as the fixing of a specified rate.

In *Oklahoma Operating Co. v. Love*, 252 U. S. 331, 335, it was said, "The order of the Commission prohibiting the company from charging, without its permission, rates higher than those prevailing in 1913, in effect prescribed maximum rates for the service. It was, therefore, a legislative order. . . ."

If by act of Congress maximum rates were declared lawful for certain classes of service, neither carrier nor shipper could thereafter draw into question in the courts the conduct of the other if it conformed to the legislative mandate, save by an attack on the constitutionality of the statute. By the amendatory legislation Congress has delegated to the Commission as its administrative arm its undoubted power to declare, within constitutional limits, what are lawful rates for the service to be performed by the carriers. The action of the Commission in fixing such rates for the future is subject to the same tests as to its validity as would be an act of Congress intended to accomplish the same purpose.

As has been pointed out, the system now administered by the Commission is dual in nature. As respects a rate made by the carrier, its adjudication finds the facts and may involve a liability to pay reparation. The Commission may, and often does, in the same proceeding, and in a single report and order, exercise its additional authority by fixing rates or rate limits for the future. But the fact that this function is combined with that of passing upon the rates theretofore and then in effect does not alter the character of the action.

As respects its future conduct the carrier is entitled to rely upon the declaration as to what will be a lawful, that is, a reasonable, rate; and if the order merely sets limits it is entitled to protection if it fixes a rate which falls within them. Where, as in this case, the Commission has made an order having a dual aspect, it may not in a subsequent proceeding, acting in its *quasi*-judicial capacity, ignore its own pronouncement promulgated in its *quasi*-legislative capacity and retroactively repeal its own enactment as to the reasonableness of the rate it has prescribed.

The Commission in its report confuses legal concepts in stating that the doctrine of *res judicata* does not affect its action in a case like this one. It is unnecessary to determine whether an adjudication with

respect to reasonableness of rates theretofore charged is binding in another proceeding, for that question is not here presented. The rule of estoppel by judgment obviously applies only to bodies exercising judicial functions; it is manifestly inapplicable to legislative action. The Commission's error arose from a failure to recognize that when it prescribed a maximum reasonable rate for the future, it was performing a legislative function, and that when it was sitting to award reparation, it was sitting for a purpose judicial in its nature. In the second capacity, while not bound by the rule of *res judicata*, it was bound to recognize the validity of the rule of conduct prescribed by it and not to repeal its own enactment with retroactive effect. It could repeal the order as it affected future action, and substitute a new rule of conduct as often as occasion might require, but this was obviously the limit of its power, as of that of the legislature itself.

The argument is pressed that this conclusion will work serious inconvenience in the administration of the Act; will require the Commission constantly to re-examine the fairness of rates prescribed, and will put an unbearable burden upon that body. If this is so, it results from the new policy declared by the Congress, which, in effect, vests in the Commission the power to legislate in specific cases as to the future conduct of the carrier. But it is also to be observed that so long as the Act continues in its present form, the great mass of rates will be carrier-made rates, as to which the Commission need take no action except of its own volition or upon complaint, and may in such case award reparation by reason of the charges made to shippers under the theretofore existing rate.

Where the Commission has, upon complaint and after hearing, declared what is the maximum reasonable rate to be charged by a carrier, it may not at a later time, and upon the same or additional evidence as to the fact situation existing when its previous order was promulgated, by declaring its own finding as to reasonableness erroneous, subject a carrier which conformed thereto to the payment of reparation measured by what the Commission now holds it should have decided in the earlier proceeding to be a reasonable one.

The judgment is affirmed.<sup>13</sup>

<sup>13</sup> Compare with the above case *Federal Sugar Refining Co. v. Central R. R. of New Jersey*, 35 I. C. C. 488 (1915); *Cattle Raisers Ass'n v. Chicago, B. & Q. R. Co.*, 12 I. C. C. 507 (1907). See Note and Comment, 34 Mich. L. Rev. 672 (1936).

The *Eagle Cotton Oil Co.* case, referred to in the brief dissent in the principal case, is discussed in 27 Ill. L. Rev. 53 (1932).

See *Mulcahy v. Public Service Commission*, 101 Utah 245, 117 P. (2d) 298 (1941), holding that the doctrine of *res judicata* should not be applied to an order of a public service commission denying an application for a motor vehicle certificate of convenience and necessity. Hence the commission could subsequently reverse its position and grant the certificate. The court held that the

MR. JUSTICE HOLMES and MR. JUSTICE BRANDEIS think that the judgment should be reversed for the reasons stated by JUDGE HUTCHESON in the concurring opinion in *Eagle Cotton Oil Co. v. Southern Ry. Co.*, 51 F. (2d) 443, 445.

**Woodworth, Collector of Internal Revenue v. Kales, Circuit Court of Appeals, Sixth Circuit, 1928. 26 F. (2d) 178.**

Action by Alice G. Kales against Fred L. Woodworth, Collector of Internal Revenue. Judgment for plaintiff on a directed verdict, and defendant brings error.

DENISON, Circuit Judge. The court below directed a verdict in favor of the plaintiff, Mrs. Kales, in her suit against the collector to recover that part of her income tax for 1919 which she has paid under protest. The critical question—one of fact—was as to the fair value on March 1, 1913, of certain Ford Motor Company stock which Mrs. Kales had then owned, and which she sold in 1919. The trial court thought each one of three grounds to be sufficient to support the directed verdict. They were: (1) That, upon a fixing of this value by the commissioner and a sale by Mrs. Kales in reliance on that valuation, an estoppel arose in her favor as against the later attempted revaluation; (2) that the assessment of the tax which the commissioner made upon the return of 1919, and which was based upon this 1913 valuation, and the later approvals of that assessment by the commissioner (and his successors), established that valuation beyond the power of that officer—except for a good cause non-existent here—to reopen and reconsider, and this by analogy to a thing adjudicated; and (3) that the deficiency assessment of 1925 which had required the payment now in dispute was void for lack of jurisdictional basis. While we rest our affirmance upon the second of these grounds, the three are not without effect upon each other; and they require a fuller statement of facts—including not only those stated in the declaration, but some things assumed as true by all counsel in the case. *Blodgett v. Holden*, 275 U. S. 142, 146, 48 S. Ct. 105.

In 1919 Mrs. Kales owned stock in the Ford Motor Company, and was asked to sell it for \$12,500 per share. She would have to pay as an income tax about two-thirds of whatever taxable profit she realized on the sale; and the amount of such profit would depend upon the fair value as of March 1, 1913. Hence whether the offer should be accepted would depend largely upon that fair value. There had been in 1913 no market price; and so it was evidence that the antedated valuation as of this earlier period would depend upon what should then have been considered the reasonable prospect of future earnings, and that six years later the best that could be done would be to make an honest and

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commission function was not "judicial" and hence the doctrine of *res judicata* should not apply. For comments on the case see 30 Geo. L. Jour. 758 (1942); 9 U. of Chi. L. Rev. 324 (1942).

intelligent estimate of the 1913 value. In this situation, the buyers applied to Commissioner of Internal Revenue Roper, and requested official inquiry and action, fixing the 1913 valuation for the guidance of those who were asked to sell. Accordingly, and (it may be assumed) after such inquiry by the experts of the Department as he thought proper, he fixed upon a figure of about \$9,500 per share as the fair 1913 value. Mrs. Kales was informed of this action, and, relying thereon, sold her stock, and included in her 1919 return a profit of about \$3,000 per share. She filed this return on March 25, 1920, and paid one-quarter of the tax shown by the whole return, which included also other items. Later that year the return was examined and the tax assessed by (acting) Commissioner Meyers upon the \$3,000 basis, a notice of such assessment was by him given to her, and she paid the remaining installments. In January, 1921, the return was further examined, and a deficiency assessment was levied by Commissioner Williams, based upon some other items of income. The assessment which included the Ford stock sale was not disturbed, but the correctness of the return in this respect was approved and confirmed by this commissioner. Later in 1921, the return was again examined by the agents of the department. A report was made approving the stock valuation which had been fixed by Commissioner Roper, and the correctness of the return and the resulting income in this respect was again approved and confirmed by Commissioner Williams. Once more, in 1922, the return was further examined by Commissioner Blair, and a deficiency assessment levied as to other items, but the correctness of the return as to this item was again confirmed. Mrs. Kales' claim of abatement as to this second deficiency assessment was denied and, after payment, a refund was refused, but in both cases Commissioner Blair confirmed and approved the return based upon the Ford stock sale and its 1913 valuation.

On March 13, 1925, Commissioner Blair (by deputy) levied a further deficiency assessment upon the income from this Ford stock sale, and upon the theory that the fair value of the stock in March, 1913, had been about \$2,500 per share—thus indicating an additional profit of about \$7,000 per share. This 1925 assessment was made without notice or hearing, but in claimed pursuance of the statute which permits so-called jeopardy assessments (section 274d, Revenue Act of 1924; Comp. St. § 6336 1/6zz (1) (d)), but there was no theory or claim of jeopardy, or any jeopardy in fact, except that the five-year statute of limitations was about to expire. It also appears that as to the first valuation by Commissioner Roper, as well as to the subsequent confirmations thereof, there is no claim of fraud or misleading or of new evidence, or of mistake of law or of specific fact, but that the new estimate of value is only a variant inference from the same evidential facts upon which the earlier estimate was founded—the language of

counsel for the Government stating the only claim of justification for the reassessment to be that it was "a new and better view of the same facts" based upon a "matured and better judgment."

This 1925 deficiency assessment was paid, and this suit was brought.

We pass without consideration the theory of estoppel, intimating no opinion. The full exercise of the governmental power of taxation doubtless requires that the authority of the taxing officer to do tax limiting acts should itself be limited; but, however that rule of limitation should be here applied, the same considerations which are urged to make out estoppel have also much force in deciding as to the finality of an assessment once made.

Where the Revenue Act itself determines the essential elements of the tax liability and leaves to the officers only the duties of computing and collecting, there would be no finality, if they leave these ministerial acts half done or wrongly done; but, where the ascertaining of an essential fact is left to their discretionary judgment, where they exercise that discretion in good faith, and where thereupon the tax is computed and paid, it seemingly must be the theory of normal operation that the matter is closed. If not closed, it must be for some reason which makes the case abnormal. When assessing officers fix the value of real estate as a basis for ad valorem taxation, and the tax is paid, may they, after one or two years, reassess, and then again and again? When they ascertain and fix the value of property as a basis of an inheritance tax, and the tax is computed and the estate closed, may they much later reopen and reassess? They may; but on one condition only—that the statutes give them authority therefor; and it is obvious, we think, that the authority must be by express words or by clear implication, in order to confer a power so extraordinary and so pregnant with danger of official oppression. . . .

We come then to inquire what statutory authority is claimed for the right to reopen and re-examine this question of the 1913 fair value of this stock, and then, upon a re-examination of the same evidence, to reach a different result, flowing not from the discovery of any fraud or mistake, clerical or otherwise, in any fundamental fact or matter of law, but resulting only from a "more matured judgment." It is not claimed that the authority can be found granted by any express words in any statute; but it is said to have sufficient basis in proper implications. In considering them, we must observe that there are implications which are reasonable, and hence to be adopted, and implications which, though possible, are unreasonable, and hence to be rejected. Every suggested implication should be tested to determine how it should be thus classified; and this testing should be in view of familiar rules affecting official action, and in view of the general plan and purposes of a revenue law, and with due regard to fair treatment of the taxpayer.



One of the chief reliances of the government's counsel for the necessary implication is upon section 250 (d) of the Revenue Law of 1918 (Comp. St. § 6336 1/8tt (d)), which we assume to be applicable to this tax, and which says that, excepting for fraud, the tax shall be assessed upon any return within five years after the return is made. This is said to imply that assessments can be made before this term expires. Of course it does, but no such implication is necessary, since the power to examine the return and make the assessment is clearly implied or given by earlier sections. To go further and to say, as government counsel do, that, because this statute implies that some reassessments may be made if within the term, it therefore implies that any reassessment may be, and thus to make no distinction between reassessments once lawful, but which cannot be made after the stated period, and unlawful assessments which never could have been made at all, is an obvious *non sequitur*. The question with which we are concerned is whether, after the valuation by Commissioner Roper and its adoption by Commissioner Meyers and its confirmation by Commissioner Williams—not to say Commissioner Blair—there was any authority for a new valuation. If there was, it must be exercised before March, 1925; but this time limitation can have no bearing upon the existence of the authority one or two or three years before the time expired. We must reject this dependence upon the statute of limitations to raise the desired implication as being without any weight.

The argument is also made that, since several statutory references imply, and the plaintiff concedes, that a reassessment might have been made even after all these confirmations, if there had appeared fraud or mistake, or misleading, or new evidence, or clerical error, or mistake of law on the part of the commissioner, therefore the assessments formerly made were open, and were subject to revision even to the extent of a new inference on the same facts. This argument would have much force—how much we need not decide—if we were undertaking to apply to the *quasi* judicial act of the commissioner in making this valuation the ordinary rules of *res judicata* as applied to judgments; but it has no force as to the narrow question of implied authority here involved. Making a reasonable implication does not compel us to make an unreasonable one. When a public official, exercising his discretion, has decided a matter of private obligation, and the decision has been accepted and acted upon, it is natural to suppose that his right to change his mind and overrule the decision should bear some analogy to the situation between individuals, in their contracts or their lawsuits. Their conclusions may always be revoked for fraud or misleading, or mutual mistake of fact, sometimes for newly discovered facts, and sometimes for clerical error or mutual mistake of law; judgments between them can sometimes be set aside on these grounds. All these considerations

naturally apply to such official action as here involved; and, as the commissioner has authority only to carry out the statute, and cannot give himself more by supposing that he has more, his mistake of law will often, or usually, justify a revision of his conclusion. No analogy drawn from the rights of individuals or from the powers of courts can be found for revoking a conclusion once deliberately made and acted upon and basing the revocation merely on the idea that the second conclusion is the result of a better matured judgment. For these and other considerations we conclude that authority to review and revise such a valuation as this for fraud, mistake, or analogous ground is reasonably to be implied from the statutes, while power thus to repudiate the former action merely because the commissioner has changed his view (or his predecessor's) of the evidence, is not reasonably implied.

The judgment is affirmed.<sup>14</sup>

### Application of Doctrine of Res Judicata to Administrative Adjudication

Does either the Arizona Grocery Company case or the Kales case hold that the doctrine of res judicata is applicable to administrative agencies?

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<sup>14</sup> In another Ford stock case, decided five days before the decision was handed down in *Woodworth v. Kales*, the Board of Tax Appeals held that the commissioner was not bound by the prior determination of value. *Re James Couzens*, 11 B. T. A. 1040 (1928). The decision was based upon the proposition that the commissioner had no power under the statute to set the value for income tax purposes prior to the consummation of this transaction of sale. The source of power to evaluate, if any, had to be derived from section 321, Revised Statutes, 13 Stat. at L. 233, which provided, "The Commissioner of Internal Revenue under the direction of the Secretary of the Treasury shall have general superintendence of the assessment and collection of all duties and taxes now or hereafter imposed by any law providing internal revenue." And see *Hauss v. Commissioner*, 12 B. T. A. 755 (1928).

Do these cases indicate a proper field for declaratory rulings by administrative tribunals? See Borchard, "Declaratory Judgments in Administrative Law," 11 N. Y. Univ. L. Q. Rev. 139.

Compare with the Ford tax cases the case of *United States v. Detroit Steel Products Co.*, 20 F. (2d) 675 (1927), in which the commissioner first ordered a refund of certain taxes and later reversed himself and sued to recover the sums so refunded.

For law review comment on the application of the doctrine of res judicata to administrative decisions see Griswold, "Res Judicata in Federal Tax Cases," 46 Yale L. Jour. 1320 (1937); "Res Judicata in Tax Suits for Successive Years," 33 Columbia L. Rev. 1404 (1933); "Res Judicata in Tax Litigation," 46 Harv. L. Rev. 692 (1933); *American Steamship Co. v. Wickwire Spencer Steel Co.*, 8 F. Supp. 562 (1934). See also 49 Yale L. Jour. 1250 (1940), and an article by Gregory, "Administrative Decisions as Res Judicata," 29 Calif. L. Rev. 741 (1941); also Schopflocher, "Doctrine of Res Judicata in Administrative Law," 1942 Wis. L. Rev. 5, 198.

If you are inclined to answer this question in the affirmative, consider the results in other cases.

In *Baldwin v. Scott County Milling Co.*, 307 U. S. 478, 83 L. Ed. 1409, 59 S. Ct. 943 (1939), the Interstate Commerce Commission had ordered a common carrier to pay reparations to a shipper. There was no appeal, and the reparations were paid in accordance with the order. Some years later, the Commission reopened the case and after further consideration decided that its original order had been erroneous, and ordered the shipper to return to the carrier the amount which it had received under the former order. This the shipper was loath to do, and he appealed from the second order, asserting that by application of *res judicata* the Commission should be foreclosed from thus changing its earlier ruling. The court held, however, that the Commission was acting within its powers.

In *Hastings Mfg. Co. v. Federal Trade Commission* (CCA 6th, 1946) 153 F. (2d) 253 it appeared that in an earlier proceeding against the respondent, the Commission had after a hearing dismissed a complaint charging that certain competitive methods employed by respondent constituted unfair trade practices. Was this *res judicata*, to prevent the Commission from later reissuing the complaint, and holding in the second proceedings that the same competitive methods were illegal? It was not, said the court.

Such cases might be taken as indicating the doctrine of *res judicata*—that a question of fact or of legal right determined by a judgment cannot be disputed in a subsequent suit between the parties thereto or their privies—does not apply to the decisions of administrative agencies. For judicial pronouncement to this effect, see *Grandview Dairy, Inc. v. Jones* (CCA 2nd, 1946) 157 F. (2d) 5.

How, then, should we account for the results in such cases as *Arizona Grocery Company and Kales*? Can they be explained on a theory of equitable estoppel—that since the private parties had relied on the earlier ruling, the agency should not be permitted to change it retroactively to their detriment? It is at once apparent that this theory has its own difficulties. In what way did the taxpayer in the *Kales* case rely to her detriment on the original valuation set by the taxing authorities?

Other cases are even more difficult to explain on an equitable estoppel theory. Consider, for example, *International Union of Mine, Mill & Smelter Workers v. Eagle-Picher Mining & Smelting Co.*, 325 U. S. 335, 89 L. Ed. 1649, 65 S. Ct. 1166 (1945). There, after finding that certain employees had been improperly discharged, the National Labor Relations Board awarded them back pay in the amount of some \$8000. The employer, after enforcement proceedings in the court of appeals, complied with the order. Thereafter, the Board on reconsideration found that its original order had been based on a mistaken understanding of

the situation; that if it had properly understood the facts as disclosed by the record, the back pay award would have amounted to a much larger sum—approximately \$800,000. Accordingly, the Board undertook to reopen the case and revise its order. The court held, however, that this could not lawfully be done. Can this result be explained on the basis of equitable estoppel?

Perhaps the question should be reduced to simple terms: Under what circumstances should an administrative agency be permitted to change its original ruling in a subsequent case involving the same parties and the same issue? It might be expected that in resolving this broad question, the courts would employ their favorite expedient of weighing the public against the private interest.

If decision be placed on this basis, it is obvious that different results will be reached in different situations.

First, consideration may be given to rulings involving nonrecurring factual situations. Perhaps the clearest case is that where the original ruling involved the making of a grant to a private party.

In patent cases, for example, if the original ruling had been to grant an applicant patent rights on an invention, a subsequent reversal of the ruling—depriving the patentee of the benefits of his patent monopoly—would seem so harsh as to suggest a deprivation of due process. In such cases, the courts have ruled that the agency may not change its mind and revoke the prior grant. See *Malone v. Hay* (App. D. C. 1926), 10 F. (2d) 905; *In re Edison*, 30 App. D. C. 321 (1908); *In re Marconi*, 38 App. D. C. 286 (1912); *New Departure Mfg. Co. v. Robinson*, 39 App. D. C. 504 (1913).

In land office cases it has been held that grants, once made, cannot be reopened except by proceedings in the nature of direct attack based upon fraud. *Noble v. Union River Logging R. Co.*, 147 U. S. 165, 37 L. Ed. 123, 13 S. Ct. 271 (1893). However, it has been held that the land office may, if it so desires, rehear an application which has been previously rejected, and allow it on the second hearing. *Beley v. Naphtaly*, 169 U. S. 353, 42 L. Ed. 775, 18 S. Ct. 354 (1898). Cf. *West v. Standard Oil Co.*, 278 U. S. 200, 73 L. Ed. 265, 49 S. Ct. 138 (1929). See 27 Mich. L. Rev. 804 (1929). Doubtless the Patent Office might, if it so desired, proceed likewise.

Licensing cases are based upon similar principles, and should be treated in the same way. *Brougham v. Blanton Mfg. Co.* (CCA 8th, 1917) 243 Fed. 503, noted in 31 Harv. L. Rev. 487 (1918).

Workmen's compensation awards, because of the likelihood that subsequent histories may reveal more serious disability than at first supposed, frequently give rise to the question as to whether an original award may be reopened and increased. At least one court has denied

the right of the agency to do so. *Bartlett Hayward Co. v. Industrial Accident Commission*, 203 Cal. 522, 265 Pac. 195 (1928). Other courts have refused to permit the commissions to reopen cases except to the extent and within the time limits prescribed by statute. See 41 Yale L. Jour. 148 (1931), and 27 Mich. L. Rev. 677 (1929). *Jarka Co., Inc. v. Monahan* (D. C. Mass., 1928) 29 F. (2d) 741 is a typical case.

All the foregoing cases—patent or land grants, awards of licenses, and (to a limited extent) workmen's compensation awards—involve nonrecurring situations. Quite different considerations come into play in cases involving a continuing course of conduct.

The policy factors deemed to be controlling in the latter type of case are illustrated by *United States v. Stone & Downer Co.*, 274 U. S. 225, 71 L. Ed. 1013, 47 S. Ct. 616 (1927). There, the court of customs appeals had decided adversely to the government a question as to the classification, for customs purposes, of certain imported commodities. In a subsequent case between the same parties, involving the same questions and importations of similar merchandise, the same tribunal reached a contrary conclusion. In rejecting the claim that the first determination should be held controlling, the supreme court declared that circumstances justified limiting the finality of the conclusion in customs controversies to the identical importation, pointing out that the business of importing is carried on by large houses between which and the government there are constant differences as to the proper classification of similar importations, and that injustice and confusion would result if one importer could rely for years on an early decision rendered as to him which permitted low customs duties on a commodity which had been ruled in other cases, involving competing importers, to be subject to a higher rate.

For similar reasons, decisions of the Interstate Commerce Commission as to the status of a carrier under particular statutory definitions may be reopened and changed, when changing conditions show the wisdom of revising the former decision, insofar as it affects continuing and future operations. In *re Chicago, N. S. & M. R. Co.* (CCA 7th, 1942) 131 F. (2d) 458; *Sprague v. Woll* (CCA 7th, 1941) 122 F. (2d) 128.

In many cases, it is difficult to balance the competing public interest in effective administration against the individual's interest in being free from repeated litigation. Thus, where the post office classifies a publication as being entitled to second-class mailing privileges, and in reliance thereon a substantial business is built up, should the agency be permitted later to change its ruling? A reversal would cause pecuniary hardship to the publisher, and might indeed put him out of business; but a continuance of the original ruling would harm his competitors who under revised administrative interpretations of the statute have been

denied similar privileges. See *Houghton v. Payne*, 194 U. S. 88, 48 L. Ed. 888, 24 S. Ct. 590 (1904).

Agencies often apply the same principles, in deciding whether to reopen a case. In *Matter of Baltimore Transit Co.*, 47 N. L. R. B. 109 (1943), it was held that where in 1937 a Regional Director of the National Labor Relations Board had dismissed charges of unfair labor practices against a company on the grounds that the agency had no jurisdiction over the company, this fact should be taken into account in subsequent proceedings wherein the Board, under a revised interpretation of its jurisdiction, had proceeded against the company and found it guilty of unfair labor practices. The Board in the latter proceeding held that the provisions of its order (as to reimbursement of certain funds to employees) would be limited to the period after the filing of the complaint by the agency in the second proceedings.

In *Ernest Strong v. Commissioner*, 7 Tax Ct. 953 (1946) it was held that after the Commissioner of Internal Revenue had won income tax cases upon a finding that there was no completed gift made by the taxpayer to his wife (the taxpayer having attempted by "deed of gift" to convey to his wife an interest in his partnership), the Commissioner could not later be heard to say in a gift tax proceeding involving the same parties that a valid completed gift, subject to gift tax, had been made.

Occasionally, a question arises as to whether one federal agency may overrule the conclusions of another federal agency, in cases involving the same parties and the same ultimate question. In *United States v. Willard Tablet Co.* (CCA 7th, 1944) 141 F. (2d) 141 the issue was whether certain medicinal tablets had been misbranded. The Federal Trade Commission had found for the company. Later, the Food and Drug Administration caused proceedings to be instituted for the condemnation of a quantity of the tablets, alleging that the labeling was false. It appeared that the fundamental issues of fact and law were the same in both proceedings. The court ruled that the prior determination of the Federal Trade Commission had a degree of finality which precluded further consideration of the matter.

An even more distressing situation was presented in *Barnard v. Carey* (D. C. Ohio, 1945) 60 F. Supp. 539. Plaintiff was the manufacturer of "Soya Butter," a product made from soya beans and certain other vegetable matter. Plaintiff was advised by the Treasury Department that the product would have to be labeled as oleomargarine. This, plaintiff would have been willing to do, but unfortunately he was instructed and warned by the Food and Drug Administration that the product could not lawfully be labeled or sold as oleomargarine. How should that problem be resolved?

**SECTION 6. DECLARATORY RULINGS BY ADMINISTRATIVE AGENCIES**

Quoted from the Final Report of the Attorney General's Committee, Pages 30-33.

In yet another respect there is room for developing predictability in the administrative process, without in the least weakening its ability to adapt itself to new needs or further experience.

In recent years, in the Federal and state courts, the device of the declaratory judgment has been provided to furnish guidance and certainty in many private relationships where previously parties proceeded at their own risk. When real conflicts of interest arise and there is an actual dispute concerning legal rights and duties, it is possible in declaratory judgment proceedings to obtain binding judicial determinations which dispose of legal controversies without the necessity of any party's acting at his peril upon his own view. But the declaratory judgment obtainable through the courts is not the answer to uncertainties which are present in the realm of administrative law. The time is ripe for introducing into administration itself an instrument similarly devised, to achieve similar results in the administrative field. The perils of unanticipated sanctions and liabilities may be as great in the one area as in the other. They should be reduced or eliminated. A major step in that direction would be the establishment of procedures by which an individual who proposed to pursue a course which might involve him in dispute with an administrative agency, might obtain from that agency, in the latter's discretion, a binding declaration concerning the consequences of his proposed action.

At the present time, advisory rulings or opinions are given by a number of agencies, including the Bureau of Customs, the Packers and Stockyards Division of the Department of Agriculture, the Post Office Department, and the Securities and Exchange Commission. Advisory rulings are not an entirely satisfactory device, however, because they invariably carry an explicit or implicit warning that the agency is not bound by the opinion it has rendered. Ordinarily the recipient of the ruling may safely rely upon the agency to adhere to its opinion; but it is not beyond the realm of possibility that a different view will be taken of the question involved when the transaction has been consummated. Consequently advisory rulings do not entirely eliminate, though they materially reduce, the element of uncertainty. Greater certainty can be achieved only by attaching to the ruling the same binding effect upon the agency that is attributed to other adjudications.

But without statutory authority an administrative agency is powerless to render a binding declaratory ruling. This disability has been

removed in some instances, although the orders which the agencies have been authorized to issue bear different names. Persons desirous of knowing whether the Federal Power Commission deems the construction of a water-power project to be subject to the provisions of the Federal Power Act, for instance, may obtain a formal finding of the Commission upon this issue by filing a declaration of intention to construct a water-power project. If the Commission determines that no permit is needed because the Act does not apply, the declarants may thereafter proceed safely. Failure to seek an advance administrative decision that they are exempt from the statute's requirements would not in itself subject these persons to any sanction. They merely have an option of securing a declaration of their status or, in the alternative, of proceeding upon their own view of the law—and at their own risk.

Another example of the administrative declaratory ruling is encountered in the binding prospective closing agreements (that is, agreements with respect to future tax liability) which, since the passage of the Revenue Act of 1938, the Bureau of Internal Revenue has been authorized to negotiate with taxpayers. Until this mechanism was devised, uncertainty concerning the possible tax liabilities created by contemplated business transactions frequently resulted in their being deferred or abandoned. Moreover, if a person did act under a mistaken apprehension of the legal consequences which would flow from this action, the desire to avoid the impact of unanticipated tax claims often impelled him to litigate. These unfortunate results of uncertainty need no longer obtain in the Federal tax field if the prospective closing agreement is used.

But the declaratory ruling is not feasible in every circumstance in which doubts may be present. A necessary condition of its ready use is that it be employed only in situations where the critical facts can be explicitly stated, without possibility that subsequent events will alter them. This is necessary to avoid later litigation concerning the applicability of a declaratory ruling which an agency may seek to disregard because, in its opinion, the facts to which it related have changed. The intrusion of variables may distort or destroy the plans concerning which the ruling was intended to give guidance. Hence it is that declaratory rulings may have no place in a complex, shifting problem like that of labor relations, while they may be extremely useful in relation, for example, to advertising practices. Whether a series of advertisements concerning distilled spirits violates a statutory or administrative prohibition can be ascertained by examining the proposed copy for the series. If a declaratory ruling be made that the proposed copy is unobjectionable, later dispute concerning applicability of the ruling is impossible. One can instantly compare the copy submitted for ruling with the copy which was actually published. If their contents are the same, the ruling is applicable; if they are different, it follows that the ruling does not



extend to the published advertisement and that the advertiser is therefore unprotected against punitive proceedings if an impropriety is detected. Since this is so, it appears entirely desirable that the Post Office Department, the Federal Trade Commission, and the Alcohol Tax Unit of the Bureau of Internal Revenue—all of which exercise authority over advertising matter—be empowered to issue declaratory rulings upon proper application. Similar conclusions may be reached in respect of certain personal status determinations on which much may hinge—as, for example, that an alien desiring to leave this country is entitled to re-enter it within a stated period of time; or that a person is an employee (or employer, as the case may be) within the meaning of the Social Security Act or the Railroad Retirement Act; or that one is not engaged in business subject to the provisions of the Fair Labor Standards Act. In situations of this sort, it is possible to ascertain the facts with the same degree of precision as would be possible if determinations were to be made at a later, and less convenient, time.

There is a possibility, though not a major one, that the opportunity to obtain a declaratory ruling might be exploited by interested persons. Innumerable requests for rulings on slightly altered facts might be made in an effort to reach the outermost edge of legal conduct without stepping over the boundary into actual illegality. If every application for a ruling were to require issuance of a binding declaration, the energies of the administrative agency might be unduly taxed. It should therefore be open to an agency to decline to give its ruling unless an applicant has demonstrated a sound necessity for administrative guidance and has supplied all essential facts. The agency should also be free to decline a ruling when, in the judgment of the agency, the question at issue is of a sort which could most wisely be determined by the presentation and decision of a series of cases.

A final phase of declaratory ruling procedure remains to be considered. It may be anticipated that in most cases in which a ruling has been issued, the applicant will be content to govern himself accordingly. In some situations, however, the applicant might have an honest belief that the administrative ruling was erroneous and would be faced with the uncomfortable choice of either abandoning his plans or proceeding in disregard of the ruling with the knowledge that he would be confronted with the imposition of a sanction. Since it is highly unlikely that he would choose the latter course, particularly where the sanction was a severe one such as the revocation of a license, provision should be made for immediate court review of declaratory rulings. The availability of judicial review would make possible the testing of a ruling by an applicant who would otherwise be compelled to desist from action believed by him to be proper.<sup>15</sup>

<sup>15</sup> For law review comment on the subject, see Vogeler, "Declaratory Rulings in Administrative Agencies," 31 Ky. L. Jour. 20 (1942), and Gellhorn, "De-

## Recommendation of Hoover Commission Task Force on Legal Services and Procedures

### RECOMMENDATION NO. 44

*Agencies should make greater use of declaratory orders, advisory opinions, and other shortened procedures.*

#### The Problem.

The achievement of certainty and consistency in governmental action affecting personal and business interests is a continuing problem in the development of administrative law. The utilization of specialized and shortened procedures can do much to remove uncertainties, to eliminate unnecessary proceedings, and to improve the adjudication of cases. Three of the most important classes of these procedures are declaratory orders, advisory opinions and letters, and the use of written submittals in place of oral testimony.

#### Declaratory Orders.

Section 5 (d) of the Administrative Procedure Act, 5 U.S.C. § 1004 (d) (1952), provides that an agency "is authorized, in its sound discretion . . . to issue a declaratory order to terminate a controversy or remove uncertainty in adjudication where a hearing is required on the record." The effect of this provision is generally to confer upon all agencies authority to do the same things that courts do under the Declaratory Judgment Act of 1934, see 28 U.S.C. §§ 2201-2202 (1952), see Sen. Doc. 248, 79th Cong., 2d sess. 362 (1946). In addition to the authority conferred by this section of the Administrative Procedure Act, several agencies are authorized by special statutes to issue declaratory orders. For example, the Securities and Exchange Commission is authorized to issue an order stating whether a corporation is a holding company within the meaning of the Holding Company Act of 1935, 15 U.S.C. § 79b (7) (1952). Some orders under this and similar statutes have been issued with a beneficial effect upon the conduct of agency affairs and in removing legal uncertainties for private persons and businesses.

The failure of most agencies to provide procedures for the issuance of declaratory orders under section 5 (d) of the Administrative Procedure Act has been revealed by the task force study. The experience of agencies with declaratory orders, as reported, is negligible. The Civil Aeronautics Board has granted one such order in its entire history; the Interstate Commerce Commission has issued a few such orders; and the Federal Power Commission has refused to issue a declaratory order, sought by a gas pipeline company under its tariff.

The purpose of section 5 (d) of the Administrative Procedure Act was to remove, in the view of the then Chairman of the House Judiciary Committee, Sen. Doc. 248, *supra*, 362:

" . . . a blind spot in our law—for parties can neither secure a declaratory judgment from the courts nor a declaratory order from the administrative agency. . . ."

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claratory Rulings by Federal Agencies," 221 Ann. Amer. Acad. Pol. and Soc. Sci. 153 (1942); also Newman "Should Official Advice Be Reliable?—Proposals as to Estoppel and Related Doctrines in Administrative Law," 53 Columbia L. Rev. 374 (1953).

In view of the limited use by agencies of declaratory orders since the enactment of the 1946 statute, the task force believes that, for all practical purposes, this "blind spot" remains.

A primary reason why declaratory orders have not been used more often is that the Administrative Procedure Act leaves the issuance of such orders to the discretion of each agency. The position taken by some agencies, moreover, that the refusal to issue a declaratory order is not a reviewable final agency action has been sustained by judicial construction of the Administrative Procedure Act, *United Gas Pipe Line Co. v. F. P. C.*, 203 F. 2d 78 (5th Cir. 1953). In the exercise of this statutory discretion, many agencies appear to have taken an over-cautious attitude.

Another important reason for the failure of agencies to make greater use of declaratory orders is that the authority conferred by the Administrative Procedure Act is subject to the exemptions contained in the introductory clause of section 5 of that act. That clause exempts adjudications not required by statute to be determined on the record after hearing; matters subject to subsequent trial de novo in court; the selection or tenure of an officer or employee of the United States; proceedings which rest solely on inspections, tests, or elections; the conduct of military, naval, and foreign affairs' functions; cases in which an agency is acting as an agent of a court; and the certification of employee representatives. The declaratory order is thus not available in many important areas of administrative activity.

#### Advisory Opinions.

The Administrative Procedure Act contains no provision for the issuance of advisory opinions or letters by agencies. Under such a procedure, private parties can be apprised of their rights and liabilities under applicable statutes, without the formality of an administrative proceeding or application for a declaratory order. This practice, however, has been permitted in some cases by separate statute, and there has been a certain amount of agency development in the field.

At least two statutes specifically authorize the issuance of an informal advisory opinion as distinguished from a formal order, rule, or regulation. An "instruction or regulation" of the Office of Alien Property may be relied upon in good faith, 50 U.S.C.App. § 5(b)(2) (1952). Under the "Portal-to-Portal" Act of 1947, good faith reliance may be placed upon any "ruling, approval or regulation" of the Department of Labor and "any administrative practice or enforcement policy of such agency," even if later rescinded or invalidated by judicial or other authority, 29 U.S.C. § 259 (1952).

By practice and precedent, letters of advice and staff opinions are given limited validity by the Bureau of Foreign Commerce, Department of Commerce, by the Federal Deposit Insurance Corporation, by the Interstate Commerce Commission, by the Post Office Department, and by the Office of Munitions Control, Department of State. This excellent practice in administrative procedure has been most effectively used by the Securities and Exchange Commission, which issues several thousand such opinion letters annually.

There is no uniform statutory provision which permits good faith reliance upon any advisory opinion or letter throughout the executive branch. The satisfactory experience of agencies which have utilized such statutory provisions, or have followed the practice independently

of statute, suggests the advisability of a more general use of the advisory opinion by all agencies of the executive branch.

Conclusions.

(1) Declaratory Orders.

Congressional intent in providing for discretionary issuance of declaratory orders has been largely disregarded by agency practice. If the declaratory order is truly to become the administrative counterpart of the declaratory judgment, agencies should be required to issue such orders in justiciable controversies, and the Administrative Procedure Act should be so amended.

(2) Advisory Opinions.

The advisory opinion procedure developed by the Securities and Exchange Commission and other agencies should be given a statutory basis and applied throughout the executive branch. Judicious use of such a procedure can do much to make the administrative process more efficient and less costly.

The Administrative Procedure Act should be amended to permit agencies to issue advisory letters, opinions, or other written statements addressed to named persons. To prevent abuse of this procedure and to ensure that unofficial expressions of opinion in writing by agency officials are not used to frustrate the effective regulatory jurisdiction of the agencies, departments and independent establishments should designate by formal rule the classes of officials who are authorized to issue written advisory opinions upon which reliance may be placed.

## PART III

### JUDICIAL RELIEF FROM ADMINISTRATIVE ACTION

#### CHAPTER VII

##### RIGHT TO JUDICIAL RELIEF—IN GENERAL

##### SECTION 1. REVIEW OF QUESTIONS OF LAW

**Chicago, Milwaukee & St. Paul Ry. Co. v. Minnesota, Supreme Court of the United States, 1890. 134 U. S. 418, 33 L. Ed. 970, 10 S. Ct. 462.**

[This is a writ of error to review a judgment of the Supreme Court of the State of Minnesota, awarding a writ of mandamus against the Chicago, Milwaukee and St. Paul Railway Company. The case arose on proceedings taken by the railroad and warehouse commission of the state of Minnesota, under an act of the legislature of that state approved March 7, 1887 (Gen. Laws 1887, c. 10) entitled "An act to regulate common carriers, and creating the railroad and warehouse commission of the state of Minnesota, and defining the duties of such commission in relation to common carriers." The commission on complaint and after notice and hearing found that the company was charging three cents per gallon for conveying milk in ten gallon cans from Owatonna and Faribault to St. Paul and Minneapolis, but only two and one-half cents per gallon from Dundas, Northfield and Farmington to the same destinations; that the three-cent rate was unreasonable and unequal; and that it should be reduced to two and one-half cents per gallon. The commission so ordered. The company refused to comply, and, on petition of the attorney general, the state Supreme Court issued a peremptory writ of mandamus directing compliance. To review this judgment the company brought a writ of error.]

MR. JUSTICE BLATCHFORD delivered the opinion of the court.

The opinion of the Supreme Court is reported in 38 Minn. 281. In it the court, in the first place, construed the statute on the question as to whether the court itself had jurisdiction to entertain the proceeding, and held that it had. Of course, we cannot review this decision.

It next proceeded to consider the question as to the nature and extent of the powers granted to the commission by the statute in the matter of fixing the rates of charges. On that subject it said: "It seems

to us that, if language means anything, it is perfectly evident that the expressed intention of the legislature is that the rates recommended and published by the commission, assuming that they have proceeded in the manner pointed out by the act, should be not simply advisory, nor merely *prima facie* equal and reasonable, but final and conclusive as to what are lawful or equal and reasonable charges; that, in proceedings to compel compliance with the rates thus published, the law neither contemplates nor allows any issue to be made or inquiry had as to their equality and reasonableness in fact. Under the provisions of the act, the rates thus published are the only ones that are lawful, and therefore, in contemplation of law, the only ones that are equal and reasonable; and hence, in proceedings like the present, there is, as said before, no fact to traverse, except the violation of the law in refusing compliance with the recommendations of the commission. Indeed, the language of the act is so plain on that point that argument can add nothing to its force."

It then proceeded to examine the question of the validity of the act under the constitution of Minnesota, as to whether the legislature was authorized to confer upon the commission the powers given to the latter by the statute. It held that as the legislature had the power itself to regulate charges by railroads, it could delegate to a commission the power of fixing such charges, and could make the judgment or determination of the commission as to what were reasonable charges final and conclusive. . . .

The construction put upon the statute by the Supreme Court of Minnesota must be accepted by this court, for the purposes of the present case, as conclusive, and not to be re-examined here as to its propriety or accuracy. The Supreme Court authoritatively declares that it is the expressed intention of the legislature of Minnesota, by the statute, that the rates recommended and published by the commission, if it proceeds in the manner pointed out by the act, are not simply advisory nor merely *prima facie* equal and reasonable, but final and conclusive as to what are equal and reasonable charges; that the law neither contemplates nor allows any issue to be made or inquiry to be had as to their equality or reasonableness in fact; that, under the statute, the rates published by the commission are the only ones that are lawful, and therefore, in contemplation of law, the only ones that are equal and reasonable; and that, in a proceeding for a mandamus under the statute, there is no fact to traverse except the violation of law in not complying with the recommendations of the commission. In other words, although the railroad company is forbidden to establish rates that are not equal and reasonable, there is no power in the courts to stay the hands of the commission, if it chooses, to establish rates that are unequal and unreasonable. This being the construction of the statute by which we are bound in considering the present case, we are of opinion that,

so construed, it conflicts with the Constitution of the United States in the particulars complained of by the railroad company. It deprives the company of its right to a judicial investigation, by due process of law, under the forms and with the machinery provided by the wisdom of successive ages for the investigation judicially of the truth of a matter in controversy, and substitutes therefor, as an absolute finality, the action of a railroad commission which, in view of the powers conceded to it by the state court, cannot be regarded as clothed with judicial functions, or possessing the machinery of a court of justice. Under section 8 of the statute, which the Supreme Court of Minnesota says is the only one which relates to the matter of the fixing by the commission of general schedules of rates, and which section, it says, fully and exclusively provides for that subject, and is complete in itself, all that the commission is required to do is, on the filing with it by a railroad company of copies of its schedules of charges, to "find" that any part thereof is in any respect unequal or unreasonable, and then it is authorized and directed to compel the company to change the same, and adopt such charge as the commission "shall declare to be equal and reasonable"; and to that end it is required to inform the company in writing in what respect its charges are unequal and unreasonable. No hearing is provided for; no summons or notice to the company before the commission has found what it is to find, and declared what it is to declare; no opportunity provided for the company to introduce witnesses before the commission,—in fact, nothing which has the semblance of due process of law; and although, in the present case, it appears that, prior to the decision of the commission, the company appeared before it by its agent, and the commission investigated the rates charged by the company for transporting milk, yet it does not appear what the character of the investigation was, or how the result was arrived at. By the second section of the statute in question, it is provided that all charges made by a common carrier for the transportation of passengers or property shall be equal and reasonable. Under this provision the carrier has a right to make equal and reasonable charges for such transportation. In the present case, the return alleged that the rate of charge fixed by the commission was not equal or reasonable, and the Supreme Court held that the statute deprived the company of the right to show that judicially. The question of the reasonableness of a rate of charge for transportation by a railroad company, involving, as it does, the element of reasonableness both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring due process of law for its determination. If the company is deprived of the power of charging reasonable rates for the use of its property, and such deprivation takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property; and thus, in substance and effect, of the property itself, without due

process of law, and in violation of the Constitution of the United States; and, in so far as it is thus deprived, while other persons are permitted to receive reasonable profits upon their invested capital, the company is deprived of the equal protection of the laws. . . .

The issuing of the peremptory writ of mandamus in this case, was, therefore, unlawful, because in violation of the Constitution of the United States; and it is necessary that the relief administered in favor of the plaintiff in error should be a reversal of the judgment of the Supreme Court awarding that writ, and an instruction for further proceedings by it not inconsistent with the opinion of this court. In view of the opinion delivered by that court, it may be impossible for any further proceedings to be taken other than to dismiss the proceeding for a mandamus, if the court should adhere to its opinion that, under the statute, it cannot investigate judicially the reasonableness of the rates fixed by the commission. Still the question will be open for review; and the judgment of this court is that the judgment of the Supreme Court of Minnesota, entered May 4, 1888, awarding a peremptory writ of mandamus in this case, be reversed, and the case be remanded to that court, with an instruction for further proceedings not inconsistent with the opinion of this court.<sup>1</sup>

BRADLEY, GRAY, and LAMAR, JJ., dissent.<sup>2</sup>

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<sup>1</sup> The principal case may be taken as the starting point in the long line of decisions under the due process clause holding state legislation unconstitutional because in violation of the mandate implicit in the words "due process of law." "It is from that decision," said Judge Hough formerly of the Second Circuit Court of Appeals, "that I date the flood." "Due Process of Law—Today," 32 Harv. L. Rev. 218, 228.

<sup>2</sup> Mr. Justice Bradley's dissenting opinion is of interest. He says, in part (p. 465):

"It is complained that the decisions of the board are final and without appeal. So are the decisions of courts in matters within their jurisdiction. There must be a final tribunal somewhere for deciding every question in the world. Injustice may take place in all tribunals. All human institutions are imperfect—courts as well as commissions and legislatures. Whatever tribunal has jurisdiction, its decisions are final and conclusive unless an appeal is given therefrom. The important question always is, what is the lawful tribunal for the particular case? In my judgment in the present case, the proper tribunal was the legislature, or the board of commissioners which it created for the purpose. . . .

"I do not mean to say that the legislature, or its constituted board of commissioners, or other legislative agency may not so act as to deprive parties of their property without due process of law. The Constitution contemplates the possibility of such an invasion of rights. But, acting within their jurisdiction, (as in these cases they have done) the invasion should be clear and unmistakable to bring the case within that category. Nothing of the kind exists in the case before us. The legislature, in establishing the commission, did not exceed its power; and the commission acting upon the cases, did not exceed its jurisdiction, and was not chargeable with any fraudulent behavior. There was purely a difference of judgment as to amount between the commission and the companies, without any indication of intent on the part of the former to do



### Right to Judicial Review of Questions of Law

It is commonly said, as a starting point in discussing judicial review of decisions of administrative tribunals, that the courts will (or must, or should) review issues of law. But is this really so?

One of the fundamental difficulties presented by this question concerns the much mooted distinction between questions of law, questions of fact and questions of discretion. If some touchstone could be found to determine in what category a particular question belonged, perhaps it could be determined whether issues of law are, as such, judicially reviewable. But no such touchstone has been discovered. As the Attorney General's Committee remarked ["Administrative Procedure in Government Agencies," Sen. Doc. No. 8, 77th Congress, 1st Session (1941), p. 90], "What one judge regards as a question of fact another thinks is a question of law."

In *Securities & Exchange Commission v. Cogan* (CA 9th, 1952), 201 F. (2d) 78, the court explained this difficulty, and added a helpful suggestion or two, in these words:

"We bear in mind of course that in this context the distinction between what are 'questions of fact' and what are 'questions of law,' to which the courts give so much lip service, is not one which may be made by drawing a line between questions which are analytically law or fact or in accordance with the traditional distinctions between what is for the jury and what is for the court. As stated in *S. E. C. v. Central-Illinois Corp.*, supra, 338 U. S. at page 126: 'Administrative finality is not, of course, applicable only to agency findings of "fact" in the narrow, literal sense.' As Professor Dickinson has said: 'In truth, the distinction between "questions of law" and "questions of fact" really gives little help in determining how far the courts will review; and for the good reason that there is no fixed distinction. They are not two mutually exclusive *kinds* of questions based upon a difference of subject matter . . . . The knife of policy alone effects an artificial cleavage at

injustice. The board may have erred; but if they did, as the matter was within their rightful jurisdiction, their decision was final and conclusive unless their proceedings could be impeached for fraud. Deprivation of property by mere arbitrary power on the part of the legislature, or fraud on the part of the commission, are the only grounds on which judicial relief may be sought against their action. There was, in truth, no deprivation of property in these cases at all. There was merely a regulation as to the enjoyment of property, made by a strictly competent authority, in a matter entirely within its jurisdiction."

In discussion of judicial review of administrative tribunal action, the case of *Chicago, Milwaukee & St. P. R. Co. v. Minnesota* is almost invariably taken as the starting point; yet the precise meaning of the case is far from clear. An excellent statement concerning it may be found in Freund, "Police Power," § 381. Cf. Dickinson, *Administrative Justice and the Supremacy of the Law*, pp. 190-192.

Is there a constitutional right to an appeal from a judicial tribunal of original jurisdiction to an appellate judicial tribunal?

the point where the court chooses to draw the line between public interest and private right.'

"We think that the best clue as to where the line should be drawn between those matters in which the court's judgment may properly be substituted for that of the administrative agency, and the sound rule as to the distinction between what, for want of better description, we here refer to as 'questions of fact' and 'questions of law,' is to be found in *Dobson v. Commissioner*, 320 U. S. 489, 498. Speaking of the question as to how far the court should go in reviewing the decisions of the Tax Court, the court said (pp. 498, 499): 'The [tax] court is independent, and its neutrality is not clouded by prosecuting duties. Its procedures assure fair hearings. Its deliberations are evidenced by careful opinions. All guides to judgment available to judges are habitually consulted and respected. It has established a tradition of freedom from bias and pressures. It deals with a subject that is highly specialized and so complex as to be the despair of judges. It is relatively better staffed for its task than is the judiciary. Its members not infrequently bring to their task long legislative or administrative experience in their subject. The volume of tax matters flowing through the Tax Court keeps its members abreast of changing statutes, regulations, and Bureau practices, informed as to the background of controversies and aware of the impact of their decisions on both Treasury and taxpayer. Individual cases are disposed of wholly on records publicly made, in adversary proceedings, and the court has no responsibility for previous handling. Tested by every theoretical and practical reason for administrative finality, no administrative decisions are entitled to higher credit in the courts.' The court then went on to discuss the difficulty inherent in the 'want of a certain standard for distinguishing "questions of law" from "questions of fact,"' and concluded that a determination of the Tax Court as to whether particular transactions were integrated or separated for tax purposes, was 'no more reviewable than any other question of fact.' The court held that review was being sought for a question 'purely an accounting problem and therefore a question of fact.'

"Judged by all ordinary analytical standards as to what is law and what is fact, the matter there before the court was clearly a question of law. The reason why the court classified the matter as a non-reviewable question of fact is to be found in the court's comments quoted above as to the special competence of the Tax Court—the fact that it is 'relatively better staffed for its task than is the judiciary.' The distinction drawn in the *Dobson* case is on the basis of the comparative qualifications of the Tax Court and of the reviewing courts. This same distinction is exemplified in the two *Chenery* cases, the so-called second *Chenery* case, *supra*, and the first *Chenery* case, *Securities Comm. v. Chenery Corp.*, 318 U. S. 80.

"In the first *Chenery* case, the order of the Commission which was there under review, was based upon the Commission's determination as to what was required by certain 'principles of equity derived from judicial decisions.' The court found that the cases upon which the Commission relied did not establish the principles of law and equity which the Commission considered sustained its order. The court without hesitation set aside the order of the Commission for clearly the question before the Commission was not one involving a determination of policy or of a matter upon which the Commission could be said to

have superior experience or competence, but rather was upon a question that was peculiarly within judicial competence.

"The contrast is furnished by the second *Chenery* case, *supra*, in which the Commission, deriving 'its conclusions from the particular facts in the case, its general experience in reorganization matters, and its informed view of statutory requirements,' announced a new principle which on the basis of its experience, it found appropriate in order to effectuate the policy of the Act. The court held that 'The wisdom of the principle adopted is none of our concern. . . . The facts being undisputed, we are free to disturb the Commission's conclusion only if it lacks any rational and statutory foundation.' 332 U. S. 207.

. . . "

In less judicial language, it has been bluntly suggested by somewhat cynical observers that if a court wishes to review a question, it is called a question of law; if not, it becomes a question of fact.

A few examples may lend point to this suggestion.

Suppose an employee is injured under circumstances which are plainly and uncontrovertibly established by the evidence. If these circumstances are such that the injury can be described as one "arising out of and in the course of his employment" the injured person is entitled to a workmen's compensation award. Is it a question of law or fact whether the circumstances should be so characterized? Some courts call it a question of law. *Haggar v. Tanis*, 320 Mich. 295, 30 N. W. (2d) 876 (1948). Per contra, *Cardillo v. Liberty Mut. Ins. Co.*, 330 U. S. 469, 91 L. Ed. 1028, 67 S. Ct. 801 (1947), where the court, while conceding that the conclusion might be considered "more legal than factual in nature," ruled that the judicial function is exhausted once it appears that the administrative decision on this question "has substantial roots in the evidence"—thus, in effect, classifying it as a finding of fact.

Frequently, a question arises whether a person is an employee or an independent contractor. If all the terms of the contractual relationship are definitely established—e. g., by reference to the terms of a written contract, or by a stipulation of facts, or by undisputed findings as to the primary facts—is the determination of the individual's status as employee or independent contractor a question of fact or a question of law? In *Tesch v. Industrial Commission*, 200 Wis. 616, 229 N. W. 194 (1930), *supra*, Ch. VI, it will be recalled, the court said that this was a question of law. However, in *National Labor Relations Board v. Hearst Publications, Inc.*, 322 U. S. 111, 88 L. Ed. 1170, 64 S. Ct. 851 (1944), *infra*, Ch. IX, the supreme court found it error for the court of appeals to independently examine the question whether the relationship was that of employee or independent contractor, declaring that this was not a question of law but merely "inferences of fact," as to which the Board's conclusion was binding if it had "warrant in the record."

Is it a question of fact or law whether administrative proceedings are in the public interest? In *Federal Trade Commission v. Klesner*, 280 U. S. 19, 74 L. Ed. 138, 50 S. Ct. 1 (1929), *infra*, Ch. IX, the court

declared that the established facts showed, *as a matter of law*, that the proceeding was not in the public interest. However, in *National Broadcasting Co., Inc. v. United States*, 319 U. S. 190, 87 L. Ed. 1344, 63 S. Ct. 997 (1943), the court ruled: "It is not for us to say that the 'public interest' will be furthered or retarded" by proceedings undertaken by the Federal Communications Commission to establish special regulations for chain broadcasting.

A question as to the "reasonableness" of a tax determination [*Trust of Bingham v. Commissioner*, 325 U. S. 365, 89 L. Ed. 1670, 65 S. Ct. 1232 (1945)] or as to the "appropriateness" of a formula devised by the Federal Power Commission [*Colorado Interstate Gas Co. v. Federal Power Commission*, 324 U. S. 581, 89 L. Ed. 1206, 65 S. Ct. 829 (1945)] is an issue of fact. On the other hand a question whether a confession was voluntary [*Watts v. State of Indiana*, 338 U. S. 49, 93 L. Ed. 1801, 69 S. Ct. 1347 and 1357 (1949)] or whether a saloon was 500 feet from a church [*Gamble v. Liquor Control Commission*, 323 Mich. 576, 36 N. W. (2d) 297 (1949)] may be treated as issues of law.

In short, the fundamental difficulty of the traditional homily that questions of law are for the court, is the impossibility of determining—until the court has spoken—whether a question is one of fact or law. As was remarked in *Baumgartner v. United States*, 322 U. S. 665, 88 L. Ed. 1525, 64 S. Ct. 1240 (1944), the distinction between questions of "fact and law is often not an illuminating test and is never self-executing." In another case [*Trust of Bingham v. Commissioner*, 325 U. S. 365, 89 L. Ed. 1670, 65 S. Ct. 1232 (1945)], Justice Frankfurter's concurring opinion explained that the court had "eschewed sterile attempts at differentiation between 'fact' and 'law' in the abstract."

Nor is this all. Three other doctrines have developed in judicial decision which have contributed significantly to the deterioration of the ancient maxim that the courts will review issues of law.

First, there has been exhibited some tendency to construe statutes as precluding judicial review, even of law questions.<sup>3</sup> See, e. g. *Ludecke v. Watkins*, 335 U. S. 160, 92 L. Ed. 1881, 68 S. Ct. 1429 (1948); *Heikkila v. Barber*, 345 U. S. 229, 97 L. Ed. 972, 73 S. Ct. 603 (1953); but cf. *Estep v. United States*, 327 U. S. 114, 90 L. Ed. 567, 66 S. Ct. 423 (1946).

Second, it appears that in matters of administrative adjudication involving the grant or denial of a privilege, rather than the determination of matters of absolute private right, the legislature may grant to administrative agencies the power to decide with finality issues of law. See *Van Horne v. Hines* (App. D. C., 1941), 122 F. (2d) 207; *Nolde & Horst Co. v. Helvering* (App. D. C., 1941), 122 F. (2d) 41.

<sup>3</sup> See Davis, "Unreviewable Administrative Action," 15 Fed. Rules Dec. 411 (1954).

Third, and perhaps most important, there has developed an attitude (which some call judicial abnegation) that while the court has the *power*, it does not necessarily have a *duty*, to review questions of law.

Thus, in *Switchmen's Union of North America v. National Mediation Board*, 320 U. S. 297, 88 L. Ed. 61, 64 S. Ct. 95 (1943), the court said: "Where Congress has not expressly authorized judicial review, the type of problem involved and the history of the statute in question become highly relevant in determining whether judicial review may nonetheless be supplied. . . . Congress has long delegated to executive officers or executive agencies the determination of complicated questions of fact and of law. And where no judicial review was provided by Congress this Court has often refused to furnish one even where questions of law might be involved." Again, in *Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp.*, 333 U. S. 103, 92 L. Ed. 568, 68 S. Ct. 431 (1948), it was remarked: "This Court long has held that statutes which employ broad terms to confer power of judicial review are not always to be read literally. Where Congress has authorized review of 'any order' or used other equally inclusive terms, courts have declined the opportunity to magnify their jurisdiction, by self-denying constructions which do not subject to judicial control orders which, from their nature, from the context of the Act, or from the relation of judicial power to the subject-matter, are inappropriate for review." Again, in *Dobson v. Commissioner*, 320 U. S. 489, 88 L. Ed. 248, 64 S. Ct. 239 (1943), the court indicated it will not necessarily concern itself with every issue which could be described as an issue of law, saying "the judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body."

No excursion into the general question as to the vitality of the review-of-law-issues doctrine<sup>4</sup> would be complete, however, without reference to certain recent developments which may lead to a reversal of the above-described trends which grew apace during the two decades, 1935-1955.

Sec. 10(e) of the Federal Administrative Procedure Act of 1946 provided: "So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law . . ."

It was thought by many that this language would be effective to persuade the courts to probe more deeply into the questions of law involved in administrative adjudication, and re-examine *de novo* the conclusions reached by administrative agencies in interpreting statutory language and applying it to particular factual situations. See, for an exposition of this hope, John Dickinson, "Administrative Procedure Act: Scope and Grounds of Broadened Judicial Review"; 33 Am. Bar Ass'n, JI. 434.

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<sup>4</sup> In this connection, see Moss, "The Administrative Interpretation of Statutes," 39 Geo. L. J. 244 (1951).

However, obvious loopholes were left alluringly open. When was it "necessary to decision" to determine relevant questions of law? Under what circumstances should it be said that such questions were "presented"?

The Hoover Commission Task Force on Legal Services and Procedure concluded in its 1955 report, pp. 216, 217, that the limited degree of judicial review afforded on many questions of law "derogates from the protection which judicial review should provide" and recommended that "the courts should always exercise an independent judgment on questions of law, and the task force believes that the courts should be assisted by some modification of the language of the Administrative Procedure Act in according a somewhat broader scope of review of mixed questions of fact and law."

## SECTION 2. REVIEW OF ISSUES OF CONSTITUTIONAL FACT

**Ohio Valley Water Co. v. Ben Avon Borough, Supreme Court of the United States, 1920. 253 U. S. 287, 64 L. Ed. 908, 40 S. Ct. 527.**

[Proceedings instituted before the Public Service Commission of Pennsylvania by Ben Avon Borough and others against the Ohio Valley Water Company. A decree of the Superior Court, reversing the order of the Commission, was reversed, and the order reinstated by the Supreme Court of Pennsylvania (260 Pa. 289) and the Water Company brings error.]

MR. JUSTICE McREYNOLDS delivered the opinion of the court.

Acting upon a complaint charging plaintiff in error, a water company, with demanding unreasonable rates, the Public Service Commission of Pennsylvania instituted an investigation and took evidence. It found the fair value of the company's property to be \$924,744 and ordered establishment of a new and lower schedule which would yield 7 per centum thereon over and above operating expenses and depreciation.

Claiming the commission's valuation was much too low and that the order would deprive it of a reasonable return and thereby confiscate its property, the company appealed to the Superior Court. The latter reviewed the certified record, appraised the property at \$1,324,621.80, reversed the order, and remanded the proceeding, with directions to authorize rates sufficient to yield 7 per centum of such sum.

The Supreme Court of the state reversed the decree and reinstated the order, saying:

"The appeal [to the Superior Court] presented for determination the question whether the order appealed from was reasonable and in conformity with law, and in this inquiry was involved the question of the fair value, for rate-making purposes, of the property of appellant, and the amount of revenue which appellant was entitled to collect. In

its decision upon the appeal, the Superior Court differed from the commission as to the proper valuation to be placed upon several items going to make up the fair value of the property of the water company for rate-making purposes."

It considered those items and held that as there was competent evidence tending to sustain the commission's conclusion and no abuse of discretion appeared, the Superior Court should not have interfered therewith.

"A careful examination of the voluminous record in this case has led us to the conclusion that in the items wherein the Superior Court differed from the commission upon the question of values there was merely the substitution of its judgment for that of the commission, in determining that the order of the latter was unreasonable."

Looking at the entire opinion we are compelled to conclude that the Supreme Court interpreted the statute as withholding from the court power to determine the question of confiscation according to their own independent judgment when the action of the commission comes to be considered on appeal.

The order here involved prescribed a complete schedule of maximum future rates and was legislative in character. *Prentis v. Atlantic Coast Line Co.*, 211 U. S. 210; *Lake Erie & Western R. R. Co. v. State Public Utility Commission*, 249 U. S. 422. In all such cases, if the owner claims confiscation of his property will result, the state must provide a fair opportunity for submitting that issue to a judicial tribunal for determination upon its own independent judgment as to both law and facts; otherwise the order is void because in conflict with the due process clause, Fourteenth Amendment. *Missouri Pac. R. R. v. Tucker*, 230 U. S. 340, 347; *Wadley Southern Ry. Co. v. Georgia*, 235 U. S. 651, 660; *Missouri v. Chicago, Burlington & Quincy R. R.*, 241 U. S. 533, 538; *Oklahoma Operating Co. v. Love* (March 22, 1920), 252 U. S. 331.

Here the insistence is that the Public Service Company Law as construed and applied by the Supreme Court has deprived plaintiff in error of the right to be so heard; and this is true if the appeal therein specifically provided is the only clearly authorized proceeding where the commission's order may be challenged because confiscatory. Thus far plaintiff in error has not succeeded in obtaining the review for which the Fourteenth Amendment requires the state to provide.

Article 6, Public Service Company Law of Pennsylvania (P. L. 1913, p. 1429):

"Sec. 31. No injunction shall issue modifying, suspending, staying, or annulling any order of the commission, or of a commissioner, except upon notice to the commission and after cause shown upon a hearing. The court of common pleas of Dauphin County is hereby clothed with exclusive jurisdiction throughout the commonwealth of all proceedings for such injunctions, subject to an appeal to the Supreme Court as

aforesaid. Whenever the commission shall make any rule, regulation, finding, determination, or order under the provisions of this act the same shall be and remain conclusive upon all parties affected thereby, unless set aside, annulled, or modified in an appeal or proceeding taken as provided in this act."

It is argued that this section makes adequate provision for testing judicially any order by the commission when alleged to be confiscatory, and that plaintiff in error has failed to take advantage of the opportunity so provided.

The Supreme Court of Pennsylvania has not ruled upon effect or meaning of section 31, or expressed any view concerning it. So far as counsel have been able to discover, no relief against an order alleged to be confiscatory has been sought under this section, although much litigation has arisen under the act. It is part of the article entitled "Practice and Procedure Before the Commission and Upon Appeal." Certain opinions by the Supreme Court seem to indicate that all objections to the commission's orders must be determined upon appeal—*St. Clair Borough v. Tamaqua & Pottsville Electric Ry. Co.*, 259 Pa. 462; *Pittsburgh Railways Co. v. Pittsburgh*, 260 Pa. 424,—but they do not definitely decide the point.

Taking into consideration the whole act, statements by the state Supreme Court concerning the general plan of regulation, and admitted local practice, we are unable to say that section 31 offered an opportunity to test the order so clear and definite that plaintiff in error was obliged to proceed thereunder or suffer loss of rights guaranteed by the Federal Constitution. On the contrary, after specifying that within 30 days an appeal may be taken to the Superior Court (section 17), the act provides (section 22):

"At the hearing of the appeal the said court shall, upon the record certified to it by the commission, determine whether or not the order appealed from is reasonable and in conformity with law."

But for the opinion of the Supreme Court in the present cause, this would seem to empower the Superior Court judicially to hear and determine all objections to an order on appeal and to make its jurisdiction in respect thereto exclusive. Of this the latter court apparently entertained no doubt; and certainly counsel did not fatally err by adopting that view, whatever meaning finally may be attributed to section 31.

Without doubt the duties of the courts upon appeals under the act are judicial in character—not legislative, as in *Prentis v. Atlantic Coast Line*, *supra*. This is not disputed; but their jurisdiction, as ruled by the Supreme Court, stopped short of what must be plainly intrusted to some court in order that there may be due process of law.

Plaintiff in error has not had proper opportunity for an adequate judicial hearing as to confiscation; and unless such an opportunity is



now available, and can be definitely indicated by the court below in the exercise of its power finally to construe laws of the state (including of course section 31), the challenged order is invalid.

The judgment of the Supreme Court of Pennsylvania must be reversed, and the cause remanded there, with instructions to take further action not inconsistent with this opinion.

Reversed.

MR. JUSTICE BRANDEIS dissenting with HOLMES and CLARKE, JJ., concurring in the dissent.

### Constitutional Fact

The doctrine that appellant is entitled to judicial re-determination of questions of constitutional fact (like the precept that one is entitled to judicial re-examination of questions of law) has been subject to considerable deterioration since the decision of the *Ben Avon* case in 1920. In *Alabama Public Service Commission v. Southern R. Co.*, 341 U. S. 341, 95 L. Ed. 1002, 71 S. Ct. 762 (1951), *infra*, Ch. IX, the court said: "Whatever the scope of review of Commission findings when an alleged denial of constitutional rights is in issue, it is now settled that a utility has no right to relitigate factual questions on the ground that constitutional rights are involved." Similarly, in *Railroad Commission of Texas v. Rowan & Nichols Oil Co.*, 310 U. S. 573, 84 L. Ed. 1368, 60 S. Ct. 1021 (1940); 311 U. S. 614, 85 L. Ed. 390, 61 S. Ct. 66 (1940); 311 U. S. 570, 85 L. Ed. 358, 61 S. Ct. 343 (1941), where it was claimed by an oil producer that the order of a state commission limiting its daily oil production was confiscatory, the court observed that the inquiry was one for determination by an administrative agency possessing expertness in the particular subject, and that it was not for the court to pass upon the propriety of the order, even though it might appear to the court that a different order would be wiser.

As far back as 1941, the Attorney General's Committee on Administrative Procedure [Sen. Doc. No. 8, 77th Congress, 1st Sess., p. 210] concluded that "in the future, fact issues involving due process, equal protection, and doubtless also other constitutional guarantees will in all probability no longer be subject to court review as a matter of constitutional right."

Nonetheless, several lower federal courts have continued to apply the *Ben Avon* doctrine in recent years. *Pichotta v. City of Skagway* (D. C. Alaska, 1948), 78 F. Supp. 999; *Atlantic Coast Line R. Co. v. Public Service Commission of South Carolina* (D. C., S. C., 1948), 77 F. Supp. 675. Further, a number of state courts have applied the doctrine. *Staten Island Edison Corp. v. Maltbie*, 296 N. Y. 374, 73 N. E. (2d) 705 (1947); *Lowell Gas Co. v. Department of Public Utilities*, 324 Mass. 80, 84 N. E. (2d) 811 (1949).

Whether the supreme court would still apply the doctrine, if squarely presented with the necessity of re-affirming or reversing it, remains uncertain.

The Ben Avon case has been the subject of much discussion in periodical literature for 35 years. For recent discussions, see note in 28 N. Y. U. L. Rev., 417 (1953); Schwartz, "A Decade of Administrative Law: 1942-1951," 51 Mich. L. Rev. 775, 859 (1953); and "The Vitality of the Ben Avon Rule," 102 U. of Pa. L. Rev. 108 (1953).

### SECTION 3. REVIEW OF ISSUES OF JURISDICTIONAL FACT

**Crowell v. Benson, Supreme Court of the United States, 1932. 285 U. S. 22, 76 L. Ed. 598, 52 S. Ct. 285.**

Suit by Charles Benson against Letus N. Crowell, as Deputy Commissioner for the Seventh Compensation District of the United States Employees' Compensation Commission, and another, to enjoin the enforcement of an award of compensation in favor of J. B. Knudsen, claimant. Decree for plaintiff was affirmed by the Circuit Court of Appeals (45 F. (2d) 66), and the deputy commissioner brings writs of certiorari, joining claimant with him on one of the writs.

MR. CHIEF JUSTICE HUGHES delivered the opinion of the court.

This suit was brought in the District Court to enjoin the enforcement of an award made by petitioner Crowell, as Deputy Commissioner of the United States Employees' Compensation Commission, in favor of the petitioner Knudsen and against the respondent Benson. The award was made under the Longshoremen's and Harbor Workers' Compensation Act (Act of March 4, 1927, c. 509, 44 Stats. 1424, U. S. C. tit. 33, §§ 901-950 [33 USCA §§ 901-950]), and rested upon the finding of the deputy commissioner that Knudsen was injured while in the employ of Benson and performing service upon the navigable waters of the United States. The complainant alleged that the award was contrary to law for the reason that Knudsen was not at the time of his injury an employee of the complainant and his claim was not "within the jurisdiction" of the Deputy Commissioner. An amended complaint charged that the act was unconstitutional upon the grounds that it violated the due process clause of the Fifth Amendment, the provision of the Seventh Amendment as to trial by jury, that of the Fourth Amendment as to unreasonable search and seizure, and the provisions of article 3 with respect to the judicial power of the United States. The District Judge denied motions to dismiss and granted a hearing *de novo* upon the facts and the law, expressing the opinion that the act would be invalid if not construed to permit such a hearing. The case was transferred to the admiralty docket, answers were filed presenting the issue as to the fact of employment, and, the evidence of both parties having been heard, the District Court decided that Knudsen was not in the employ of

the petitioner and restrained the enforcement of the award. 33 F. (2d) 137; 38 F. (2d) 306. The decree was affirmed by the Circuit Court of Appeals [45 F. (2d) 66] and this court granted writs of certiorari. 283 U. S. 814, 51 S. Ct. 353, 75 L. Ed. 1430.

The question of the validity of the act may be considered in relation to (1) its provisions defining substantive rights and (2) its procedural requirements. . . .

Second. The objections to the procedural requirements of the act relate to the extent of the administrative authority which it confers. The administration of the act—"except as otherwise specifically provided"—was given to the United States Employees' Compensation Commission, which was authorized to establish compensation districts, appoint deputy commissioners, and make regulations. Sections 39, 40 (33 USCA §§ 939, 940). Claimants must give written notice to the deputy commissioner and to the employer of the injury or death within thirty days thereafter; the deputy commissioner may excuse failure to give such notice for satisfactory reasons. Section 12 (33 USCA § 912). If the employer contests the right to compensation, he is to file notice to that effect. Section 14 (d) 33 USCA § 914 (d). A claim for compensation must be filed with the deputy commissioner within a prescribed period, and it is provided that the deputy commissioner shall have full authority to hear and determine all questions in respect to the claim. Sections 13, 19 (a), 33 USCA §§ 913, 919 (a). Within ten days after the claim is filed, the deputy commissioner, in accordance with regulations prescribed by the Commission, must notify the employer and any other person who is considered by the deputy commissioner to be an interested party. The deputy commissioner is required to make, or cause to be made, such investigations as he deems to be necessary, and upon application of any interested party must order a hearing upon notice, at which the claimant and the employer may present evidence. Employees claiming compensation must submit to medical examination. Section 19 (33 USCA § 919). In conducting investigations and hearings, the deputy commissioner is not bound by common law or statutory rules of evidence, or by technical or formal rules of procedure, except as the act provides, but he is to proceed in such manner "as to best ascertain the rights of the parties." Section 23 (a), 33 USCA § 923 (a). He may issue subpoenas, administer oaths, compel the attendance and testimony of witnesses, the production of documents or other evidence or the taking of depositions, and may do all things conformable to law which may be necessary to enable him effectively to discharge his duties. Proceedings may be brought before the appropriate federal court to punish for misbehavior or contumacy as in case of contempt. Section 27 (33 USCA § 927). Hearings before the deputy commissioner are to be public and reported stenographically, and the Commission is to provide by regulation for the preparation of a record.

Section 23 (b). Compensation orders are to be filed in the office of the deputy commissioner, and copies must be sent to the claimant and employer. Section 19. The act provides that it shall be presumed, in the absence of substantial evidence to the contrary, that the claim comes within the provisions of the act, that sufficient notice of claim has been given, that the injury was not occasioned solely by the intoxication of the injured employee, or by the willful intention of such employee to injure or kill himself or another. Section 20 (33 USCA § 920). A compensation order becomes effective when filed, and, unless proceedings are instituted to suspend it or set it aside it becomes final at the expiration of thirty days. Section 21 (a), 33 USCA § 921 (a). If there is a change in conditions, the order may be modified or a new order made. Section 22 (33 USCA § 922). In case of default for thirty days in the payment of compensation, application may be made to the deputy commissioner for a supplementary order declaring the amount in default. Such an order is to be made after investigation, notice, and hearing, as in the case of claims. Upon filing a certified copy of the supplementary order with the clerk of the federal court, as stated, judgment is to be entered for the amount declared in default, if such supplementary order "is in accordance with law." Review of the judgment may be had as in civil suits for damages at common law, and the judgment may be enforced by writ of execution. Section 18 (33 USCA § 918).

The fact further provides that, if a compensation order is "not in accordance with law," it "may be suspended or set aside, in whole or in part, through injunction proceeds, mandatory or otherwise, brought by any party in interest" against the deputy commissioner making the order and instituted in the federal District Court for the judicial district in which the injury occurred. Payment is not to be stayed pending such proceedings unless, on hearing after notice, the court allows the stay on evidence showing that the employer would otherwise suffer irreparable damage. Section 21 (b), 33 USCA § 921 (b). Beneficiaries of awards or the deputy commissioner may apply for enforcement to the federal District Court, and, if the court determines that the order "was made and served in accordance with law," obedience may be compelled by writ of injunction or other proper process. Section 21 (c).

1. The contention under the due process clause of the Fifth Amendment relates to the determination of questions of fact. Rulings of the deputy commissioner upon questions of law are without finality. So far as the latter are concerned, full opportunity is afforded for their determination by the federal courts through proceedings to suspend or to set aside a compensation order (section 21 (b), by the requirement that judgment is to be entered on a supplementary order declaring default only in case the order follows the law (section 18), and by the

provision that the issue of injunction or other process in a proceeding by a beneficiary to compel obedience to a compensation order is dependent upon a determination by the court that the order was lawfully made and served (section 21 (c)). Moreover, the statute contains no express limitation attempting to preclude the court, in proceedings to set aside an order as not in accordance with law, from making its own examination and determination of facts whenever that is deemed to be necessary to enforce a constitutional right properly asserted. See *Ohio Valley Water Co. v. Ben Avon Borough*, 253 U. S. 287, 289, 40 S. Ct. 527, 528, 64 L. Ed. 908; *Ng Fung Ho v. White*, 259 U. S. 276, 284, 285, 42 S. Ct. 492, 66 L. Ed. 938; *Prendergast v. New York Telephone Co.*, 262 U. S. 43, 50, 43 S. Ct. 466, 67 L. Ed. 853; *Tagg Bros. & Moorhead v. United States*, 280 U. S. 420, 443, 444, 50 S. Ct. 220, 74 L. Ed. 524; *Phillips v. Commissioner*, 283 U. S. 589, 600, 51 S. Ct. 608, 75 L. Ed. 1289. As the statute is to be construed so as to support rather than to defeat it, no such limitation is to be implied. *Panama Railroad Co. v. Johnson*, 264 U. S. 375, 390, 44 S. Ct. 391, 68 L. Ed. 748.

Apart from cases involving constitutional rights to be appropriately enforced by proceedings in court, there can be no doubt that the act contemplates that as to questions of fact, arising with respect to injuries to employees within the purview of the act, the findings of the deputy commissioner, supported by evidence and within the scope of his authority, shall be final. To hold otherwise would be to defeat the obvious purpose of the legislation to furnish a prompt, continuous, expert, and inexpensive method for dealing with a class of questions of fact which are peculiarly suited to examination and determination by an administrative agency specially assigned to that task. The object is to secure within the prescribed limits of the employer's liability an immediate investigation and a sound practical judgment, and the efficacy of the plan depends upon the finality of the determinations of fact with respect to the circumstances, nature, extent, and consequences of the employee's injuries and the amount of compensation that should be awarded. And this finality may also be regarded as extending to the determination of the question of fact whether the injury "was occasioned solely by the intoxication of the employee or by the willful intention of the employee to injure or kill himself or another." While the exclusion of compensation in such cases is found in what are called "coverage" provisions of the act (section 3 [33 USCA § 903]), the question of fact still belongs to the contemplated routine of administration, for the case is one of employment within the scope of the act, and the cause of the injury sustained by the employee as well as its character and effect must be ascertained in applying the provisions for compensation. The use of the administrative method for these purposes, assuming due notice, proper opportunity to be heard, and that

findings are based upon evidence, falls easily within the principle of the decisions sustaining similar procedure against objections under the due process clauses of the Fifth and Fourteenth Amendments.

The statute provides for notice and hearing, and an award made without proper notice, or suitable opportunity to be heard, may be attacked and set aside as without validity. The objection is made that, as the deputy commissioner is authorized to prosecute such inquiries as he may consider necessary, the award may be based wholly or partly upon an *ex parte* investigation and upon unknown sources of information, and that the hearing may be merely a formality. The statute, however, contemplates a public hearing, and regulations are to require "a record of the hearings and other proceedings before the deputy commissioners." Section 23 (b), 33 USCA § 923 (b). This implies that all proceedings by the deputy commissioner upon a particular claim shall be appropriately set forth, and that whatever facts he may ascertain and their sources shall be shown in the record and be open to challenge and opposing evidence. Facts conceivably known to the deputy commissioner, but not put in evidence so as to permit scrutiny and contest, will not support a compensation order. *Interstate Commerce Commission v. Louisville & Nashville R. R. Co.*, 227 U. S. 88, 93, 33 S. Ct. 185, 57 L. Ed. 431; *The Chicago Junction Case*, 264 U. S. 258, 263, 44 S. Ct. 317, 68 L. Ed. 667; *United States v. Abilene & Southern Railway Co.*, 265 U. S. 274, 288, 44 S. Ct. 565, 68 L. Ed. 1016. An award not supported by evidence in the record is not in accordance with law. But the fact that the deputy commissioner is not bound by the rules of evidence which would be applicable to trials in court or by technical rules of procedure (section 23 (a), 33 USCA § 923 (a)) does not invalidate the proceeding, provided substantial rights of the parties are not infringed. *Interstate Commerce Commission v. Baird*, 194 U. S. 25, 44, 24 S. Ct. 563, 48 L. Ed. 860; *Interstate Commerce Commission v. Louisville & Nashville R. R. Co.*, *supra*; *Spiller v. Atchison, T. & S. F. Ry. Co.*, 253 U. S. 117, 131, 40 S. Ct. 466, 64 L. Ed. 810; *United States v. Abilene & Southern Railway Co.*, *supra*; *Tagg Bros. & Moorhead v. United States*, *supra*, at page 442 of 280 U. S., 50 S. Ct. 220.

2. The contention based upon the judicial power of the United States, as extended "to all Cases of admiralty and maritime Jurisdiction" (Const. art. 3), presents a distinct question. In *Murray's Lessee v. Hoboken Land & Improvement Company*, 18 How. 272, 284, 15 L. Ed. 372, this court, speaking through Mr. JUSTICE CURTIS, said: "To avoid misconstruction upon so grave a subject, we think it proper to state that we do not consider congress can either withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty; nor, on the other hand, can it bring under the judicial power a matter which, from its nature, is not a subject for judicial determination." . . .

As to determinations of fact, the distinction is at once apparent between cases of private right and those which arise between the government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments. The court referred to this distinction in *Murray's Lessee v. Hoboken Land & Improvement Company*, *supra*, pointing out that "there are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper." Thus the Congress, in exercising the powers confided to it, may establish "legislative" courts (as distinguished from "constitutional courts in which the judicial power conferred by the Constitution can be deposited") which are to form part of the government of territories or of the District of Columbia, or to serve as special tribunals "to examine and determine various matters, arising between the government and others, which from their nature do not require judicial determination and yet are susceptible of it." But "the mode of determining matters of this class is completely within congressional control. Congress may reserve to itself the power to decide, may delegate that power to executive officers, or may commit it to judicial tribunals." *Ex parte Bakelite Corporation*, 279 U. S. 438, 451, 49 S. Ct. 411, 413, 73 L. Ed. 789. Familiar illustrations of administrative agencies created for the determination of such matters are found in connection with the exercise of the congressional power as to interstate and foreign commerce, taxation, immigration, the public lands, public health, the facilities of the post office, pensions, and payments to veterans.

The present case does not fall within the categories just described, but is one of private right, that is, of the liability of one individual to another under the law as defined. But, in cases of that sort, there is no requirement that, in order to maintain the essential attributes of the judicial power, all determinations of fact in constitutional courts shall be made by judges. On the common-law side of the federal courts, the aid of juries is not only deemed appropriate but is required by the Constitution itself. In cases of equity and admiralty, it is historic practice to call to the assistance of the courts, without the consent of the parties, masters, and commissioners or assessors, to pass upon certain classes of questions, as, for example, to take and state an account or to find the amount of damages. While the reports of masters and commissioners in such cases are essentially of an advisory nature, it has not been the practice to disturb their findings when they are properly based upon evidence, in the absence of errors of law, and the parties have no right to demand that the court shall redetermine the facts thus found. In admiralty, juries were anciently in use not only in criminal cases

but apparently in civil cases also. The Act of February 26, 1845 (c. 20, 5 Stat. 726), purporting to extend the admiralty jurisdiction of the federal District Courts to certain cases arising on the Great Lakes, gave the right to "trial by jury of all facts put in issue in such suits, where either party shall require it." After the decision in the case of *The Genesee Chief*, supra, holding that the federal District Courts possessed general jurisdiction in admiralty over the lakes, and navigable waters connecting them, under the Constitution and the Judiciary Act of 1789 (chapter 20, § 9, 1 Stat. pp. 76, 77), this court regarded the Enabling Act of 1845 as "obsolete and of no effect, with the exception of the clause which gives to either party the right of trial by jury when requested." *The Eagle*, 8 Wall. 15, 25, 19 L. Ed. 365. And this provision, the court said, was "rather a mode of exercising jurisdiction than any substantial part of it." See R. S. § 566, USC, tit. 28, § 770, 28 USCA § 770. CHIEF JUSTICE TANEY, in delivering the opinion of the court in the case of *The Genesee Chief*, supra, referring to this requirement, thus broadly stated the authority of Congress to change the procedure in courts of admiralty.

"The power of Congress to change the mode of proceeding in this respect in its courts of admiralty, will, we suppose, hardly be questioned. The Constitution declares that the judicial power of the United States shall extend to 'all cases of admiralty and maritime jurisdiction.' But it does not direct that the court shall proceed according to ancient and established forms, or shall adopt any other form or mode of practice. The grant defines the subjects to which the jurisdiction may be extended by Congress. But the extent of the power as well as the mode of proceeding in which that jurisdiction is to be exercised, like the power and practice in all the other courts of the United States, are subject to the regulation of Congress, except where that power is limited by the terms of the Constitution, or by necessary implication from its language. In admiralty and maritime cases there is no such limitation as to the mode of proceeding, and Congress may therefore in cases of that description, give either party right of trial by jury, or modify the practice of the court in any other respect that it deems more conducive to the administration of justice."

It may also be noted that, while on an appeal in admiralty cases "the facts, as well as the law, would be subjected to review and retrial," this court has recognized the power of the Congress "to limit the effect of an appeal to a review of the law as applicable to facts finally determined below." *The Francis Wright*, 105 U. S. 381, 386, 26 L. Ed. 1100; *The Connemara* (*Sinclair v. Cooper*) 108 U. S. 352, 359, 2 S. Ct. 754, 27 L. Ed. 751. Compare *Luckenbach S. S. Co. v. United States*, 272 U. S. 533, 536, 537, 47 S. Ct. 186, 71 L. Ed. 394.

In deciding whether the Congress, in enacting the statute under review, has exceeded the limits of its authority to prescribe procedure



in cases of injury upon navigable waters, regard must be had, as in other cases where constitutional limits are invoked, not to mere matters of form, but to the substance of what is required. The statute has a limited application, being confined to the relation of master and servant, and the method of determining the questions of fact, which arise in the routine of making compensation awards to employees under the act, is necessary to its effective enforcement. The act itself, where it applies, establishes the measure of the employer's liability, thus leaving open for determination the questions of fact as to the circumstances, nature, extent, and consequences of the injuries sustained by the employee for which compensation is to be made in accordance with the prescribed standards. Findings of fact by the deputy commissioner upon such questions are closely analogous to the findings of the amount of damages that are made according to familiar practice by commissioners or assessors, and the reservation of full authority to the court to deal with matters of law provides for the appropriate exercise of the judicial function in this class of cases. For the purposes stated, we are unable to find any constitutional obstacle to the action of the Congress in availing itself of a method shown by experience to be essential in order to apply its standards to the thousands of cases involved, thus relieving the courts of a most serious burden while preserving their complete authority to insure the proper application of the law.

3. What has been said thus far relates to the determination of claims of employees within the purview of the act. A different question is presented where the determinations of fact are fundamental or "jurisdictional," in the sense that their existence is a condition precedent to the operation of the statutory scheme. These fundamental requirements are that the injury occurs upon the navigable waters of the United States, and that the relation of master and servant exists. These conditions are indispensable to the application of the statute, not only because the Congress has so provided explicitly (section 3), but also because the power of the Congress to enact the legislation turns upon the existence of these conditions.

In amending and revising the maritime law, the Congress cannot reach beyond the constitutional limits which are inherent in the admiralty and maritime jurisdiction. Unless the injuries to which the act relates occur upon the navigable waters of the United States, they fall outside that jurisdiction. Not only is navigability itself a question of fact, as waters that are navigable in fact are navigable in law, but, where navigability is not in dispute, the locality of the injury, that is, whether it has occurred upon the navigable waters of the United States, determines the existence of the congressional power to create the liability prescribed by the statute. Again, it cannot be maintained that the Congress has any general authority to amend the maritime law so as to establish liability without fault in maritime cases, regardless of par-

ticular circumstances or relations. It is unnecessary to consider what circumstances or relations might permit the imposition of such a liability by amendment of the maritime law, but it is manifest that some suitable selection would be required. In the present instance, the Congress has imposed liability without fault only where the relation of master and servant exists in maritime employment, and, while we hold that the Congress could do this, the fact of that relation is the pivot of the statute, and, in the absence of any other justification, underlies the constitutionality of this enactment. If the person injured was not an employee of the person sought to be held, or if the injury did not occur upon the navigable waters of the United States, there is no ground for an assertion that the person against whom the proceeding was directed could constitutionally be subjected, in the absence of fault upon his part, to the liability which the statute creates.

In relation to these basic facts, the question is not the ordinary one as to the propriety of provision for administrative determinations. Nor have we simply the question of due process in relation to notice and hearing. It is rather a question of the appropriate maintenance of the federal judicial power in requiring the observance of constitutional restrictions. It is the question whether the Congress may substitute for constitutional courts, in which the judicial power of the United States is vested, an administrative agency—in this instance a single deputy commissioner—for the final determination of the existence of the facts upon which the enforcement of the constitutional rights of the citizen depend. The recognition of the utility and convenience of administrative agencies for the investigation and finding of facts within their proper province, and the support of their authorized action, does not require the conclusion that there is no limitation of their use, and that the Congress could completely oust the courts of all determinations of fact by vesting the authority to make them with finality in its own instrumentalities or in the executive department. That would be to sap the judicial power as it exists under the Federal Constitution, and to establish a government of a bureaucratic character alien to our system, wherever fundamental rights depend, as not infrequently they do depend, upon the facts, and finality as to facts becomes in effect finality in law.

In this aspect of the question, the irrelevancy of state statutes and citations from state courts as to the distribution of state powers is apparent. A state may distribute its powers as it sees fit, provided only that it acts consistently with the essential demands of due process and does not transgress those restrictions of the Federal Constitution which are applicable to state authority. In relation to the federal government, we have already noted the inappositeness to the present inquiry of decisions with respect to determinations of fact, upon evidence and within the authority conferred, made by administrative agencies which have

been created to aid in the performance of governmental functions, and where the mode of determination is within the control of the Congress; as, e. g., in the proceedings of the Land Office pursuant to provisions for the disposition of public lands, of the authorities of the Post Office in relation to postal privileges, of the Bureau of Internal Revenue with respect to taxes, and of the Labor Department as to the admission and deportation of aliens. *Ex parte Bakelite Corporation*, *supra*. Similar considerations apply to decisions with respect to determinations of fact by boards and commissions created by the Congress to assist it in its legislative process in governing various transactions subject to its authority, as, for example, the rates and practices of interstate carriers, the Legislature thus being able to apply its standards to a host of instances which it is impracticable to consider and legislate upon directly and the action being none the less legislative in character because taken through a subordinate body. And where administrative bodies have been appropriately created to meet the exigencies of certain classes of cases and their action is of a judicial character, the question of the conclusiveness of their administrative findings of fact generally arises where the facts are clearly not jurisdictional and the scope of review as to such facts has been determined by the applicable legislation. None of the decisions of this sort touch the question which is presented where the facts involved are jurisdictional or where the question concerns the proper exercise of the judicial power of the United States in enforcing constitutional limitations.

Even where the subject lies within the general authority of the Congress, the propriety of a challenge by judicial proceedings of the determinations of fact deemed to be jurisdictional, as underlying the authority of executive officers, has been recognized. When proceedings are taken against a person under the military law, and enlistment is denied, the issue has been tried and determined *de novo* upon habeas corpus. *In re Grimley*, 137 U. S. 147, 154, 155, 11 S. Ct. 54, 34 L. Ed. 636. See, also, *In re Morrissey*, 137 U. S. 157, 158, 11 S. Ct. 57, 34 L. Ed. 644; *Givens v. Zerbst*, 255 U. S. 11, 20, 41 S. Ct. 227, 65 L. Ed. 475. While, in the administration of the public land system, questions of fact are for the consideration and judgment of the Land Department and its decision of such questions is conclusive, it is equally true that, if lands "never were public property, or had previously been disposed of, or if Congress had made no provision for their sale, or had reserved them, the department would have no jurisdiction to transfer them." This court has held that "matters of this kind, disclosing a want of jurisdiction, may be considered by a court of law. In such cases the objection to the patent reaches beyond the action of the special tribunal, and goes to the existence of a subject upon which it was competent to act." *Smelting Company v. Kemp*, 104 U. S. 636, 641, 26 L. Ed. 875. In such a case, the invalidity of the patent may be shown in a collateral

proceeding. *Polk's Lessee v. Wendal*, 9 Cranch 87, 3 L. Ed. 665; *Patterson v. Winn*, 11 Wheat. 380, 6 L. Ed. 500; *Minter v. Crommelin*, 18 How. 87, 15 L. Ed. 279; *Morton v. Nebraska*, 21 Wall. 660, 675, 22 L. Ed. 639; *Noble v. Union River Logging Railroad*, 147 U. S. 165, 174, 13 S. Ct. 271, 37 L. Ed. 123. The question whether a publication is a "book" or a "periodical" has been reviewed upon the evidence received in a suit brought to restrain the Postmaster General from acting beyond his authority in excluding the publication from carriage as second class mail matter. *Hitchcock v. Smith*, 34 App. D. C. 521, 530-533; *Id.*, 226 U. S. 54, 59, 33 S. Ct. 6, 57 L. Ed. 119.

In cases brought to enforce constitutional rights, the judicial power of the United States necessarily extends to the independent determination of all questions, both of fact and law, necessary to the performance of that supreme function. The case of confiscation is illustrative, the ultimate conclusion almost invariably depending upon the decisions of questions of fact. This court has held the owner to be entitled to "a fair opportunity for submitting that issue to a judicial tribunal for determination upon its own independent judgment as to both law and facts." *Ohio Valley Water Company v. Ben Avon Borough*, *supra*. See, also, *Prendergast v. New York Telephone Company*, 262 U. S. 43, 50, 43 S. Ct. 466, 67 L. Ed. 853; *Tagg Bros. & Moorhead v. United States*, *supra*; *Phillips v. Commissioner*, 283 U. S. 589, 600, 51 S. Ct. 608, 75 L. Ed. 1289. Jurisdiction in the executive to order deportation exists only if the person arrested is an alien, and while, if there were jurisdiction, the findings of fact of the executive department would be conclusive, the claim of citizenship "is thus a denial of an essential jurisdictional fact" both in the statutory and the constitutional sense, and a writ of habeas corpus will issue "to determine the status." Persons claiming to be citizens of the United States "are entitled to a judicial determination of their claims," said this court in *Ng Fung Ho v. White*, *supra*, at page 285 of 259 U. S., 42 S. Ct. 492, 495, 66 L. Ed. 938, and in that case the cause was remanded to the Federal District Court "for trial in that court of the question of citizenship."

In the present instance, the argument that the Congress has constituted the deputy commissioner a fact-finding tribunal is unavailing, as the contention makes the untenable assumption that the constitutional courts may be deprived in all cases of the determination of facts upon evidence even though a constitutional right may be involved. Reference is also made to the power of the Congress to change the procedure in courts of admiralty, a power to which we have alluded in dealing with the function of the deputy commissioner in passing upon the compensation claims of employees. But when fundamental rights are in question, this court has repeatedly emphasized "the difference in security of judicial over administrative action." *Ng Fung Ho v. White*, *supra*. Even where issues of fact are tried by juries in the federal courts,

such trials are under the constant superintendence of the trial judge. In a trial by jury in a federal court the judge is "not a mere moderator," but "is the governor of the trial" for the purpose of assuring its proper conduct as well as of determining questions of law. *Herron v. Southern Pacific Co.*, 283 U. S. 91, 95, 51 S. Ct. 383, 75 L. Ed. 857. In the federal courts, trial by jury "is a trial by a jury of 12 men in the presence and under the superintendence of a judge empowered to instruct them on the law and to advise them on the facts, and (except on the acquittal of a criminal charge) to set aside their verdict, if, in his opinion, it is against the law or the evidence." *Capital Traction Co. v. Hof*, 174 U. S. 1, 13, 14, 19 S. Ct. 580, 585, 43 L. Ed. 873. Where testimony in an equity cause is not taken before the court, the proceeding is still constantly subject to the court's control. And while the practice of obtaining the assistance of masters in chancery and commissioners in admiralty may be regarded, as we have pointed out, as furnishing a certain analogy in relation to the normal authority of the deputy commissioner in making what is virtually an assessment of damages, the proceedings of such masters and commissioners are always subject to the direction of the court, and their reports are essentially advisory, a distinction of controlling importance when questions of a fundamental character are in issue.

When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided. We are of the opinion that such a construction is permissible and should be adopted in the instant case. The Congress has not expressly provided that the determination by the deputy commissioner of the fundamental or jurisdictional facts as to the locality of the injury and the existence of the relation of master and servant shall be final. The finality of such determinations of the deputy commissioner is predicated primarily upon the provision (section 19 (a), 33 USCA § 919 (a) that he "shall have full power and authority to hear and determine all questions in respect of such claim." But "such claim" is the claim for compensation under the act and by its explicit provisions is that of an "employee," as defined in the act, against his "employer." The fact of employment is an essential condition precedent to the right to make the claim. The other provision upon which the argument rests is that which authorizes the federal court to set aside a compensation order if it is "not in accordance with law." Section 21 (b), 33 USCA § 921 (b). In the absence of any provision as to the finality of the determination by the deputy commissioner of the jurisdictional fact of employment, the statute is open to the construction that the court in determining whether a compensation order is in accordance with law may determine the fact of employment which underlies the operation of the statute. And, to remove the

question as to validity, we think that the statute should be so construed. Further, the act expressly requires that, if any of its provisions is found to be unconstitutional, "or the applicability thereof to any person or circumstances" is held invalid, the validity of the remainder of the act and "the applicability of such provision to other persons and circumstances" shall not be affected. Section 50 (33 USCA § 950). We think that this requirement clearly evidences the intention of the Congress, not only that an express provision found to be unconstitutional should be disregarded without disturbing the remainder of the statute, but also that any implication from the terms of the act which would render them invalid should not be indulged. This provision also gives assurance that there is no violation of the purpose of the Congress in sustaining the determinations of fact of the deputy commissioner where he acts within his authority in passing upon compensation claims while denying finality to his conclusions as to the jurisdictional facts upon which the valid application of the statute depends. . . .

[The court thereupon proceeded to consider the question as to whether or not there should be a trial *de novo* in the District Court in such cases. The court held that a *de novo* trial of the jurisdictional facts was essential to satisfy constitutional limitations.]

It cannot be regarded as an impairment of the intended efficiency of an administrative agency that it is confined to its proper sphere, but it may be observed that the instances which permit of a challenge to the application of the statute, upon the grounds we have stated, appear to be few. Out of the many thousands of cases which have been brought before the deputy commissioners throughout the country, a review by the courts has been sought in only a small number, and an inconsiderable proportion of these appear to have involved the question whether the injury occurred within the maritime jurisdiction or whether the relation of employment existed.

We are of the opinion that the District Court did not err in permitting a trial *de novo* on the issue of employment. Upon that issue the witnesses who had testified before the deputy commissioner and other witnesses were heard by the District Court. The writ of certiorari was not granted to review the particular facts, but to pass upon the question of principle. With respect to the facts, the two courts below are in accord, and we find no reason to disturb their decision.

Decree affirmed.

Justices BRANDEIS, STONE and ROBERTS dissent.

### Jurisdictional Fact

The doctrine of *Crowell v. Benson*, that the court will review *de novo* questions of jurisdictional fact, was said by Justice Frankfurter in

Estep v. United States of America, 327 U. S. 114, 142, 90 L. Ed. 567, 66 S. Ct. 423 (1946) to have now "earned a deserved repose."

The accuracy of this prognostication is open to some doubts. See Schwartz, "Does the Ghost of Crowell vs. Benson still Walk?" 98 U. of Pa. L. Rev. 163 (1950).

However, apart from lower court cases, it is difficult to find any re-affirmation of Crowell v. Benson in recent years.

In Connecticut Light & Power Co. v. Federal Power Commission, 324 U. S. 515, 89 L. Ed. 1150, 65 S. Ct. 749 (1945), in considering a claim that the Commission had improperly asserted jurisdiction, the court, instead of deciding the issue of jurisdiction, remanded the case for further consideration by the agency, saying in part: "It is not for us to make an original appraisal of the facts. We do not, therefore, undertake to decide as an original matter whether the facilities in question are or are not facilities which can subject the Company to the Act. . . . We will not undertake to make an original finding as to jurisdiction. . . ."

See Myers v. Bethlehem Shipbuilding Corp., 303 U. S. 41, 82 L. Ed. 638, 58 S. Ct. 459 (1938), *infra* Ch. IX; and Order of Railway Conductors of America v. Swan, 329 U. S. 520, 91 L. Ed. 471, 67 S. Ct. 405 (1947), where the court found justification for making a determination of jurisdictional fact only because of "administrative stagnation."

In a number of decisions in cases arising under state compensation acts, the question as to whether or not the relation of employer and employee existed has been so treated as to make the decision of the Commission conclusive if supported by competent evidence. Hillen v. Industrial Accident Commission, 199 Cal. 577, 250 Pac. 570 (1926).

Crowell v. Benson, both as to its doctrine of jurisdictional constitutional facts, and as to the requirement of a *de novo* trial of such facts, has been much discussed and criticized. See Dickinson, "Crowell v. Benson: Judicial Review of Administrative Determinations of Questions of 'Constitutional Fact,'" 80 U. of Pa. L. Rev. 1055 (1932); Larson, "The Doctrine of Constitutional Fact," 15 Temple L. Q. 185 (1941).

To quote a bit of criticism from Frankfurter, J., dissenting in City of Yonkers v. United States, 320 U. S. 685, 88 L. Ed. 400, 64 S. Ct. 327 (1944):

"Analysis is not furthered by speaking of such findings as 'jurisdictional,' and not even when—to adapt a famous phrase—jurisdictional is softened by a quasi. 'Jurisdiction' competes with 'right' as one of the most deceptive of legal pitfalls. The opinions in Crowell v. Benson, 285 U. S. 22, 76 L. Ed. 598, 52 S. Ct. 285, and the casuistries to which they have given rise bear unedifying testimony of the morass into which one is led in working out problems of judicial review over administrative decisions by loose talk about jurisdiction."

**SECTION 4. NONJUDICIAL QUESTIONS**

**Federal Radio Commission v. General Electric Co., Supreme Court of the United States, 1930. 281 U. S. 464, 74 L. Ed. 969, 50 S. Ct. 389.**

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

A review is sought here of a decision of the Court of Appeals of the District of Columbia given on an appeal from an order of the Radio Commission.

The General Electric Company owned and was operating a broadcasting station at Schenectady, New York, when the Radio Act of 1927 went into effect. Thereafter it sought and obtained from the commission successive licenses under that act for the further operation of the station. The last license was issued November 1, 1927, for that calendar month, and was prolonged until November 11, 1928, by successive short extensions.

January 14, 1928, the company made application for a renewal of that license. The application was not acted upon until October 12, 1928, and then the commission ordered that a license be not issued with terms like those of the existing license, but that one be issued with other terms much less advantageous to the company and the communities which it was serving—the chief change being a pronounced reduction in the admissible hours of service. The company regarded this order as a refusal of its application for a renewal of the existing license and prosecuted an appeal, under par. 16 of the Act of 1927, to the Court of Appeals of the District of Columbia. After a hearing that court found from the record returned by the commission that public convenience, interest and necessity would be served by renewing the existing license without change in its terms, and on that basis held that such a renewal should be granted and that the proceeding should be remanded to the commission with a direction to carry the court's decision into effect. Costs were assessed against the commission, 58 App. D. C. 386, 31 F. (2d) 630. On the petition of the commission, certiorari was then granted by this court.

Our jurisdiction to review the decision of the Court of Appeals is challenged.

The Act of (February 23), 1927, chap. 169, 44 Stat. at L. 1162, was enacted as a regulation of interstate and foreign radio communication; and it is in such activities that the company's broadcasting station is used. The act, as amended in (March 28), 1928, chap. 263, 45 Stat. at L. 373, in (March 4), 1929, chap. 701, 45 Stat. at L. 1559, U. S. C. title 47, par. 89, directs that no broadcasting station be used in such communication except in accordance with the act and under a license granted for the purpose; authorizes the Radio Commission to grant station licenses and renewals thereof, both for periods not exceeding three months, and otherwise gives it wide powers in administering the



act; restricts the granting of station licenses and renewals to instances "where public convenience, interest or necessity will be served thereby"; authorizes the commission to determine the question of public convenience, interest or necessity; declares that decisions of the commission in all matters over which it has jurisdiction "shall be final, subject to the right of appeal" therein given; provides (par. 16) that any applicant for a station license or the renewal of such a license, whose application is refused by the commission, may appeal from such decision to the Court of Appeals of the District of Columbia; directs that the grounds of the appeal be stated and the revision be confined to them; requires the commission, where an appeal is taken, to transmit to the court the originals or certified copies of all papers and evidence presented upon the application refused, together with a copy of the commission's decision and a statement of the facts and grounds of the decision; authorizes the court to take additional evidence upon such terms and conditions as it may deem proper; and provides that the court "shall hear, review and determine the appeal upon said record and evidence, and may alter or revise the decision appealed from and enter such judgment as to it may seem just."

We think it plain from this résumé of the pertinent parts of the act that the powers confided to the commission respecting the granting and renewal of station licenses are purely administrative and that the provision for appeals to the court of appeals does no more than make that court a superior and revising agency in the same field. The court's province under that provision is essentially the same as its province under the legislation which up to a recent date permitted appeals to it from administrative decisions of the Commissioner of Patents. Indeed, the provision in the Act of 1927 is patterned largely after that legislation. And while a few differences are found, there is none that is material here.

Referring to the provisions for patent appeals this court said in *Butterworth v. United States*, 112 U. S. 50, 60, 28 L. Ed. 656, 659, 5 Sup. Ct. Rep. 25, that the function of the court thereunder was not that of exercising ordinary jurisdiction at law or in equity, but of taking a step in the statutory proceeding under the patent laws in aid of the Patent Office. And in *Postum Cereal Co. v. California Fig Nut Co.*, 272 U. S. 693, 698, 71 L. Ed. 478, 480, 47 Sup. Ct. 284, which related to a provision for a like appeal in a trademark proceeding, this court held: "The decision of the court of appeals under par. 9 of the Act of (February 20) 1905, is not a judicial judgment. It is a mere administrative decision. It is merely an instruction to the Commissioner of Patents by a court which is made part of the machinery of the Patent Office for administrative purposes." Another case in point is *Keller v. Potomac Electric Power Co.*, 261 U. S. 428, 442-444, 67 L. Ed. 731, 736, 737, 43 Sup. Ct. 445, which involved a statutory pro-

ceeding in the courts of the District of Columbia to revise an order of a commission fixing the valuation of the property of a public utility for future rate-making purposes. There this court held that the function assigned to the courts of the District in the statutory proceeding was not judicial in the sense of the Constitution, but was legislative and advisory, because it was that of instructing and aiding the commission in the exertion of power which was essentially legislative.

In the cases just cited, as also in others, it is recognized that the courts of the District of Columbia are not created under the judiciary article of the Constitution but are legislative courts, and therefore that Congress may invest them with jurisdiction of appeals and proceedings such as have been just described.

But this court cannot be invested with jurisdiction of that character, whether for purposes of review or otherwise. It was brought into being by the judiciary article of the Constitution, is invested with judicial power only and can have no jurisdiction other than of cases and controversies falling within the classes enumerated in that article. It cannot give decisions which are merely advisory; nor can it exercise or participate in the exercise of functions which are essentially legislative or administrative. *Keller v. Potomac Electric Power Co.*, supra (261 U. S. 444, 67 L. Ed. 736, 34 Sup. Ct. 445) and cases cited; *Postum Cereal Co. v. California Fig Nut Co.*, supra (272 U. S. 700, 701, 71 L. Ed. 481, 47 Sup. Ct. 284); *Liberty Warehouse Co. v. Grannis*, 273 U. S. 70, 74, 71 L. Ed. 541, 544, 47 Sup. Ct. 282; *Willing v. Chicago Auditorium Ass'n*, 277 U. S. 274, 289, 72 L. Ed. 880, 884, 48 Sup. Ct. 507; *Ex parte Bakelite Corp.*, 279 U. S. 438, 449, 73 L. Ed. 789, 793, 49 Sup. Ct. 411.

The proceeding on the appeal from the commission's action, is quite unlike the proceeding under pars. 1001 (a)–1004 (b) of the Revenue Act of (February 26) 1926, chapter 27, 44 Stat. at L. 109, U. S. C. title 26, pars. 1224–1227, on a petition for the review of a decision of the Board of Tax Appeals; for, as this court heretofore has pointed out, such a petition (a) brings before the reviewing court the United States or its representative on the one hand and the interested taxpayer on the other, (b) presents for consideration either the right of the United States to the payment of a tax claimed to be due from the taxpayer or his right to have refunded to him money which he has paid to satisfy a tax claimed to have been erroneously charged against him, and (c) calls for a judicial and binding determination of the matter so presented—all of which makes the proceeding a case or controversy within the scope of the judicial power as defined in the judiciary article. *Old Colony Trust Co. v. Commissioner of Internal Revenue*, 279 U. S. 716, 724–727, 73 L. Ed. 918, 925–927, 49 Sup. Ct. 499.

And what is said in some of the cases already cited respecting the nature and purpose of suits to enforce or set aside orders of the Inter-

state Commerce Commission as also orders of the Federal Trade Commission, makes it apparent that the jurisdiction exercised in those suits is not administrative, but strictly judicial, and therefore quite unlike the jurisdiction exercised on appeals from the Radio Commission.

Of course the action of the Court of Appeals in assessing the costs against the commission did not alter the nature of the proceeding.

Our conclusion is that the proceeding in that court was not a case or controversy in the sense of the judiciary article, but was an administrative proceeding, and therefore that the decision therein is not reviewable by this court.

Writ of certiorari dismissed.<sup>5</sup>

**Fong Yue Ting v. United States, Supreme Court of the United States, 1893. 149 U. S. 698, 37 L. Ed. 905, 13 S. Ct. 1016.**

These were three writs of *habeas corpus*, granted by the Circuit Court of the United States for the Southern District of New York, upon petitions of Chinese laborers, arrested and held by the marshal of the district for not having certificates of residence, under section 6 of the act of May 5, 1892, c. 60, which is copied in the margin.

The first petition alleged that the petitioner was a person of the Chinese race, born in China, and not a naturalized citizen of the United

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<sup>5</sup> By Act of July 1, 1930, c. 788, Congress amended section 16 of the Radio Act to limit the review by the Court of Appeals. As so amended, the review was limited to "questions of law," and provision was made to the effect that "findings of fact" if supported by substantial evidence should be conclusive. In *Federal Radio Commission v. Nelson Bros. Bond & Mortgage Co.*, 289 U. S. 266, 77 L. Ed. 1166, 53 S. Ct. 627 (1933), the Supreme Court held that under the amended statute the reviewing power of the Court of Appeals was judicial in nature. The court further held that the decision of the Court of Appeals could be reviewed by the Supreme Court on certiorari. See 33 *Columbia L. Rev.* 921 (1933).

For further light upon what is regarded as "legislative" review as distinguished from judicial review, see *Keller v. Potomac Elec. Power Co., Inc.*, 261 U. S. 428, 67 L. Ed. 731, 43 S. Ct. 445 (1923), concerning the review on the merits of valuation for rate making purposes; *Postum Cereal Co., Inc. v. California Fig Nut Co.*, 272 U. S. 693, 71 L. Ed. 478, 47 S. Ct. 284 (1927), concerning review of trade-mark cases on the merits.

As to the status of the Court of Customs Appeals and the Court of Claims, see *Ex parte Bakelite Corp.*, 279 U. S. 438, 73 L. Ed. 789, 49 S. Ct. 411 (1929); and *Williams v. United States*, 289 U. S. 553, 77 L. Ed. 1372, 53 S. Ct. 751 (1933). As to the status of territorial courts, see *American Ins. Co. v. Canter*, 1 Pet. 511 (1828). As to the courts of the District of Columbia, see *O'Donoghue v. United States*, 289 U. S. 516, 77 L. Ed. 1356, 53 S. Ct. 740 (1933).

For a thorough discussion of the subject of legislative courts, see Katz, "Federal Legislative Courts," 43 *Harv. L. Rev.* 894 (1930); and for a criticism of the restriction upon judicial review in the constitutional courts as regards so-called legislative acts of administrative bodies, see Smith, "Judicial Functions in Legislative Bodies," 27 *Va. L. Rev.* 417 (1941).

States; that in or before 1879 he came to the United States, with the intention of remaining and taking up his residence therein, and with no definite intention of returning to China, and had ever since been a permanent resident of the United States, and for more than a year last past had resided in the city, county and State of New York, and within the second district for the collection of internal revenue in that State; that he had not, since the passage of the act of 1892, applied to the collector of internal revenue of that district for a certificate of residence, as required by section 6, and was and always had been without such certificate of residence; and that he was arrested by the marshal, claiming authority to do so under that section, without any writ or warrant. The return of the marshal stated that the petitioner was found by him within the jurisdiction of the United States, and in the Southern District of New York, without the certificate of residence required by that section; that he had therefore arrested him with the purpose and intention of taking him before a United States judge within that district; and that the petitioner admitted to the marshal, in reply to questions put through an interpreter, that he was a Chinese laborer, and was without the required certificate of residence.

MR. JUSTICE GRAY, after stating the facts, delivered the opinion of the court.

The general principles of public law which lie at the foundation of these cases are clearly established by previous judgments of this court, and by the authorities therein referred to.

In the recent case of *Nishimura Ekiu v. United States*, 142 U. S. 651, 659, the court, in sustaining the action of the executive department, putting in force an act of Congress for the exclusion of aliens, said: "It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe. In the United States, this power is vested in the national government, to which the Constitution has committed the entire control of international relations, in peace as well as in war. It belongs to the political department of the government, and may be exercised either through treaties made by the President and Senate, or through statutes enacted by Congress."

The same views were more fully expounded in the earlier case of *Chae Chan Ping v. United States*, 130 U. S. 581, in which the validity of a former act of Congress, excluding Chinese laborers from the United States, under the circumstances therein stated, was affirmed.

In the elaborate opinion delivered by Mr. Justice Field, in behalf of the court, it was said: "Those laborers are not citizens of the United States; they are aliens. That the government of the United States,

through the action of the legislative department, can exclude aliens from its territory is a proposition which we do not think open to controversy. Jurisdiction over its own territory to that extent is an incident of every independent nation. It is a part of its independence. If it could not exclude aliens, it would be to that extent subject to the control of another power. . . . The United States, in their relation to foreign countries and their subjects or citizens, are one nation, invested with powers which belong to independent nations, the exercise of which can be invoked for the maintenance of its absolute independence and security throughout its entire territory," 130 U. S. 603, 604.

It was also said, repeating the language of Mr. Justice Bradley in *Knox v. Lee*, 12 Wall. 457, 555: "The United States is not only a government, but it is a national government, and the only government in this country that has the character of nationality. It is invested with power over all the foreign relations of the country, war, peace, and negotiations and intercourse with other nations; all of which are forbidden to the state governments." 130 U. S. 605. And it was added: "For local interests the several States of the Union exist; but for international purposes, embracing our relations with foreign nations, we are but one people, one nation, one power." 130 U. S. 606.

The court then went on to say: "To preserve its independence, and give security against foreign aggression and encroachment, is the highest duty of every nation, and to attain these ends nearly all other considerations are to be subordinated. It matters not in what form such aggression and encroachment come, whether from the foreign nation acting in its national character, or from vast hordes of its people crowding in upon us. The government, possessing the powers which are to be exercised for protection and security, is clothed with authority to determine the occasion on which the powers shall be called forth; and its determination, so far as the subjects affected are concerned, is necessarily conclusive upon all its departments and officers. If, therefore, the government of the United States, through its legislative department, considers the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security, their exclusion is not to be stayed because at the time there are no actual hostilities with the nation of which the foreigners are subjects. The existence of war would render the necessity of the proceeding only more obvious and pressing. The same necessity, in a less pressing degree, may arise when war does not exist, and the same authority which adjudges the necessity in one case must also determine it in the other. In both cases, its determination is conclusive upon the judiciary. If the government of the country of which the foreigners excluded are subjects is dissatisfied with this action, it can make complaint to the executive head of our government, or resort to any other measure which, in its judgment, its interests or dignity may demand; and there lies its

only remedy. The power of the government to exclude foreigners from the country, whenever, in its judgment, the public interests require such exclusion, has been asserted in repeated instances, and never denied by the executive or legislative departments." 130 U. S. 606, 607. This statement was supported by many citations from the diplomatic correspondence of successive Secretaries of State, collected in Wharton's *International Law Digest*, § 206.

The right of a nation to expel or deport foreigners, who have not been naturalized or taken any steps towards becoming citizens of the country, rests upon the same grounds, and is as absolute and unqualified as the right to prohibit and prevent their entrance into the country.

The right to exclude or to expel all aliens, or any class of aliens, absolutely or upon certain conditions, in war or in peace, being an inherent and inalienable right of every sovereign and independent nation, essential to its safety, its independence and its welfare, the question now before the court is whether the manner in which Congress has exercised this right in sections 6 and 7 of the act of 1892 is consistent with the Constitution.

The United States are a sovereign and independent nation, and are vested by the Constitution with the entire control of international relations, and with all the powers of government necessary to maintain that control and to make it effective. The only government of this country, which other nations recognize or treat with, is the government of the Union; and the only American flag known throughout the world is the flag of the United States.

The Constitution of the United States speaks with no uncertain sound upon this subject. That instrument, established by the people of the United States as the fundamental law of the land, has conferred upon the President the executive power; has made him the commander-in-chief of the army and navy; has authorized him, by and with the consent of the Senate, to make treaties, and to appoint ambassadors, public ministers and consuls; and has made it his duty to take care that the laws be faithfully executed. The Constitution has granted to Congress the power to regulate commerce with foreign nations, including the entrance of ships, the importation of goods and the bringing of persons into the ports of the United States; to establish a uniform rule of naturalization; to define and punish piracies and felonies committed on the high seas, and offences against the law of nations; to declare war, grant letters of marque and reprisal; and to make rules concerning captures on land and water; to raise and support armies, to provide and maintain a navy, and to make rules for the government and regulation of the land and naval forces; and to make all laws necessary and proper for carrying into execution these powers, and all other powers vested by the Constitu-

tion in the government of the United States or in any department or officer thereof. And the several States are expressly forbidden to enter into any treaty, alliance or confederation; to grant letters of marque and reprisal; to enter into any agreement or compact with another State, or with a foreign power; or to engage in war, unless actually invaded, or in such imminent danger as will not admit of delay.

In exercising the great power which the people of the United States, by establishing a written Constitution as the supreme and paramount law, have vested in this court, of determining, whenever the question is properly brought before it, whether the acts of the legislature or of the executive are consistent with the Constitution, it behooves the court to be careful that it does not undertake to pass upon political questions, the final decision of which has been committed by the Constitution to the other departments of the government.

As long ago said by Chief Justice Marshall, and since constantly maintained by this court: "The sound construction of the Constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the Constitution, are constitutional. . . . Where the law is not prohibited, and is really calculated to effect any of the objects intrusted to the government, to undertake here to inquire into the degree of its necessity would be to pass the line which circumscribes the judicial department, and to tread on legislative ground. This court disclaims all pretensions to such a power." *McCulloch v. Maryland*, 4 Wheat. 316, 421, 423; *Juilliard v. Greenman*, 110 U. S. 421, 440, 450; *Ex parte Yarbrough*, 110 U. S. 651, 658; *In re Rapier*, 143 U. S. 110, 134; *Logan v. United States*, 144 U. S. 263, 283.

The power to exclude or to expel aliens, being a power affecting international relations, is vested in the political departments of the government, and is to be regulated by treaty or by act of Congress, and to be executed by the executive authority according to the regulations so established, except so far as the judicial department has been authorized by treaty or by statute, or is required by the paramount law of the Constitution, to intervene.

In *Nishimura Ekiu's case*, it was adjudged that, although Congress might, if it saw fit, authorize the courts to investigate and ascertain the facts upon which the alien's right to land was made by the statutes to depend, yet Congress might intrust the final determination of those facts to an executive officer, and that, if it did so, his order was due

process of law, and no other tribunal, unless expressly authorized by law to do so, was at liberty to re-examine the evidence on which he acted, or to controvert its sufficiency. 142 U. S. 660.

The power to exclude aliens and the power to expel them rest upon one foundation, are derived from one source, are supported by the same reasons, and are in truth but parts of one and the same power.

The power of Congress, therefore, to expel, like the power to exclude aliens, or any specified class of aliens, from the country, may be exercised entirely through executive officers; or Congress may call in the aid of the judiciary to ascertain any contested facts on which an alien's right to be in the country has been made by Congress to depend.

Congress, having the right, as it may see fit, to expel aliens of a particular class, or to permit them to remain, has undoubtedly the right to provide a system of registration and identification of the members of that class within the country, and to take all proper means to carry out the system which it provides.

It is no new thing for the law-making power, acting either through treaties made by the President and Senate, or by the more common method of acts of Congress, to submit the decision of questions, not necessarily of judicial cognizance, either to the final determination of executive officers, or to the decision of such officers in the first instance, with such opportunity for judicial review of their action as Congress may see fit to authorize or permit.

For instance, the surrender, pursuant to treaty stipulations, of persons residing or found in this country, and charged with crime in another, may be made by the executive authority of the President alone, when no provision has been made by treaty or by statute for an examination of the case by a judge or magistrate. Such was the case of Jonathan Robbins, under article 27 of the Treaty with Great Britain of 1794, in which the President's power in this regard was demonstrated in the masterly and conclusive argument of John Marshall in the House of Representatives. 8 Stat. 129; Wharton's State Trials, 392; Bee, 286; 5 Wheat. appx. 3. But provision may be made, as it has been by later acts of Congress, for a preliminary examination before a judge or commissioner; and in such case the sufficiency of the evidence on which he acts cannot be reviewed by any other tribunal, except as permitted by statute. Act of August 12, 1848, c. 167, 9 Stat. 302; Rev. Stat. §§ 5270-5274; *Ex parte Metzger*, 5 How. 176; *Benson v. McMahon*, 127 U. S. 457; *In re Oteiza*, 136 U. S. 330.

So claims to recover back duties illegally exacted on imports may, if Congress so provides, be finally determined by the Secretary of the Treasury. *Cary v. Curtis*, 3 How. 236; *Curtis v. Fiedler*, 2 Black, 461, 478, 479; *Arnson v. Murphy*, 109 U. S. 238, 240. But Congress may, as it did for long periods, permit them to be tried by suit against the collector of customs. Or it may, as by the existing statutes, provide



for their determination by a board of general appraisers, and allow the decisions of that board to be reviewed by the courts in such particulars only as may be prescribed by law. Act of June 10, 1890, c. 407, §§ 14, 15, 25, 26 Stat. 137, 138, 141; *In re Fassett*, 142 U. S. 479, 486, 487; *Passavant v. United States*, 148 U. S. 214.

To repeat the careful and weighty words uttered by Mr. Justice Curtis, in delivering a unanimous judgment of this court upon the question what is due process of law: "To avoid misconstruction upon so grave a subject, we think it proper to state that we do not consider Congress can either withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty; nor, on the other hand, can it bring under the judicial power a matter which, from its nature, is not a subject for judicial determination. At the same time, there are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which Congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper." *Murray v. Hoboken Co.*, 18 How. 272, 284.

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**Hodges v. Public Service Commission, Supreme Court of West Virginia (1931).** 110 W. Va. 649, 159 S. E. 834.

HATCHER, J. This proceeding was instituted by West Virginia Power & Transmission Company before the Public Service Commission under the Water Power Act of 1929. See ch. 58, Acts 1929. The commission granted the applicant a license to construct a series of dams on Cheat River and its watershed. The protestants are citizens of West Virginia who resisted the application before the commission, and then appealed to the circuit court of Kanawha county which reversed the commission and remanded the proceeding. The applicant secured an appeal to this court.

The act made the governor of the state a member of the Public Service Commission and authorized the commission to investigate the effect of any proposed development of water power upon railroads, cities, towns and villages and on the development of other natural resources; to hold hearings, etc., in connection with an application for a water power license; and directed the commission (among other things) "to weigh from the standpoint of the state as a whole and the people thereof the advantages and disadvantages arising therefrom before acting upon any application for license," and to grant no license until the commission should have determined that the advantages substantially exceeded the disadvantages. The act provided for an appeal as a matter of right by any party of record from any decision of the commission granting or refusing to grant a license (and from any other final decision or order

of the commission) to the circuit court of Kanawha county, with trial on the appeal de novo upon the original record before the commission and upon any additional evidence offered by any party in interest. An appeal from the circuit court to this court was provided, to be "upon the record in the circuit court in the usual manner." If reversed on either appeal, the act directed that the case be remanded to the commission for further proceedings "in accordance with the decision of the court."

The protestants initially contend that the act violates article V of the Constitution of West Virginia, in conferring legislative powers upon the governor, and, on appeal, upon the circuit court of Kanawha county.

Article V is as follows:

"The legislative, executive and judicial departments shall be separate and distinct, so that neither shall exercise the powers properly belonging to either of the others; nor shall any person exercise the powers of more than one of them at the same time, except that justices of the peace shall be eligible to the legislature."

The phraseology of the article follows that of the Constitutions of Virginia and older states. The framers of these older Constitutions were disciples of such great political teachers as Blackstone, Montesquieu and Paley, who had declared that in order to prevent arbitrary conduct by those in control, the legislative, executive and judicial powers must be kept separate. See Story on the Constitution (5th Ed.), ch. VII. These teachings had been exemplified in the division of governmental power practiced in England. Hamilton asserted: "There is no liberty if the powers of judging be not separated from the legislative and executive powers." His expression was but the common thought of his contemporaries. See Willoughby, *supra*, § 1058. Bryce, "The American Commonwealth," I Vol., p. 26. So thoroughly were these early statesmen imbued with this idea, that the very first resolution passed in the convention which framed our national Constitution, called for a separation of governmental powers. Story refers to this division as "a fundamental proposition," Cooley as a "fundamental principle," and Ordronaux as "this fundamental truth." (Const. Leg. 344). "All writers on constitutional law," said SMITH, J., in *State v. Johnson*, 61 Kan. 803, 814, "are agreed that the functions of the three departments should be kept as distinct and separate as possible."

This historical background is reflected perfectly in the Constitution of West Virginia. The separation of powers prescribed in article V is confirmed and consummated in other articles of the Constitution; namely, article VI vests the legislative power in a senate and house of delegates; article VII forms the executive department, consisting of the governor, secretary of state, state superintendent of free schools, auditor, treasurer and the attorney general; and article VIII lodges the judicial

power of the state "in a supreme court of appeals, in circuit courts and the judges thereof, in such inferior tribunals as herein authorized and in justices of the peace." We are aware that section 12 of article VIII confers on circuit courts "such other jurisdiction, whether supervisory, original, appellate or concurrent, as is or may be prescribed by law"; and that by reason of this clause, this court has upheld enactments imposing on circuit courts jurisdiction in such legislative matters as the valuation of property for taxation (on appeal) and the incorporation of towns. See *Mackin v. County Court*, 38 W. Va. 338, and *In re Union Mines*, 39 W. Va. 179, 182, in which the court said: "In discharging these functions the circuit court . . . acts as a part of the legislative branch of the government under the express authority of the Constitution." The phrase "other jurisdiction" in section 12 is general. The inhibition in article V against the exercise of dual authority is specific. Recognizing the force of that inhibition, this court said that it "necessarily follows" if an act "in any degree requires the circuit court to exercise legislative powers, it is to that extent void." *Shepherd v. Wheeling*, 30 W. Va. 479, 481. So, instead of special authority for, the Constitution affords express authority against the circuit court becoming a legislative branch. *In re Union Mines* overlooks both the positive inhibition in article V and the entire constitutional design to separate the powers of government, as set forth in articles V, VI, VII and VIII. Prior to the words "other jurisdiction," section 12 mentions certain proceedings and cases in which circuit courts shall have jurisdiction, which the context clearly shows is judicial jurisdiction. No intimation is given there or elsewhere that circuit courts may assume the duties of another department, either as subordinates or as supervisors. We cannot agree that after delimiting the three departments of the government so precisely, the framers then meant by the words "other jurisdiction" to confer on circuit courts departmental authority in or over the other two departments. We adopt the natural inference that the "other jurisdiction" is jurisdiction essentially juridical (then or thereafter prescribed by law) over proceedings not named in the section.

This construction of section 12 is not to be taken as unsettling the practice of circuit courts to incorporate towns and to entertain appeals from boards of equalization and review on the valuation of property for taxation. This practice has been pursued in such a great number of cases and over so many years, that we are of opinion it should not be disturbed now. However, this procedure applies to local matters only; and we feel no obligation because of submission thereto, to approve the further delegation of legislative functions to the judiciary, particularly in a proceeding of statewide interest, such as this.

We are mindful that courts have not drawn "abstract analytical lines of separation" (37 Harv. L. Rev. 1014) between the departments and

there is some overlapping of judicial and administrative duties. Courts recognize "necessary areas of interaction" (*idem*) and not infrequently exercise powers which are technically administrative. Such encroachments on other departmental powers are undoubtedly proper when incidental to the performance of legitimate judicial functions. "The grant of power embraced in one of the great departments of government carries with it the right to use means appropriate to the exercise of that power." *Ry. Company's Appeal*, 69 Conn. 576, 594. *Willoughby*, *supra*, § 1062. It would therefore seem that the plain language of article V calls not for construction, but only for obedience.

The local investigation and subsequent determination, by the commission, of the effect of a proposed development from "the standpoint of the state as a whole and the people thereof" (as required by the act) are clearly legislative in character. *Lbr. Co. v. Com.*, 91 W. Va. 446, 450. "The question of what the public convenience requires is a political, not a legal one." *Fall v. Sutter Co.*, 21 Cal. 237. "Whether a certain drainage district should be organized, and what lands should be included in such a district for drainage purposes are legislative questions." *Funkhouser v. Randolph*, 287 Ill. 94. Upon the appeal, it is apparent that the legislature intended the circuit court to try and determine these legislative matters *de novo*, without regard to the findings of the commission. Such a proceeding would plainly traverse both mandates of article V. "Whether a drainage ditch proposed to be constructed . . . will be conducive to the public health, convenience or welfare, or whether the route thereof is practicable, are questions of governmental or administrative policy, and are not of judicial cognizance, and jurisdiction over them by appeal or otherwise cannot be conferred upon the courts by statute." *Tyson v. Wash. Co.*, 78 Neb. 211, 12 L. R. A. (N. S.) 350. . . .

For like reasons, the act also violates both the spirit and letter of the Constitution, in imposing purely legislative duties on an executive, the governor. . . .

This attempt of the legislature to commit one of its great responsibilities to the judiciary is a flattering display of confidence in our department. But we must reject this expansion of our power just as firmly as we should resist a reduction of our rightful authority. The legislature is the trustee of the state's resources. Courts can no more assume that trusteeship than they could correct legislative impolicy thereon. After one hundred years of observation, the Supreme Court of the United States extolled the tripartite division of governmental powers as "one of the chief merits" of the American system of written constitutions and said that it was essential to the successful working of the system "that the persons intrusted with power in any one of these branches shall not be permitted to encroach upon the powers confided to the others, but each shall by the law of its creation be

limited to the exercise of the powers appropriate to its own department and no other." *Kilbourn v. Thompson*, 103 U. S. 168, 190, 191. Loyalty to this system, under our oaths of office which exact support of the Constitution, compels us to declare unconstitutional the act in its entirety.

Accordingly the judgment of the circuit court is reversed, and this court, proceeding to enter such judgment as the circuit court should have entered, sets aside the order of the Public Service Commission and dismisses the application.

Judgment reversed; order of the Public Service Commission set aside; application dismissed.<sup>6</sup>

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<sup>6</sup> The state supreme courts have not declined to review commission decisions as to motorbus certificates of convenience and necessity referred to them for review pursuant to statutory appeals in public utility acts. For example, see *Superior Motor Bus Co. v. Community Motor Bus Co.*, 320 Ill. 175, 150 N. E. 668 (1926).

But see *State ex rel. Waterworth v. Harty*, 278 Mo. 685, 213 S. W. 443 (1919), in which the court, being asked to pass upon the reasonableness of fire insurance rates pursuant to the provisions of the Missouri statute calling for judicial review *de novo*, refused to review the commission's action, saying, "It is clear from the principles announced . . . that the courts of this state, under our Constitution, are prohibited from participating in the process of establishing a system of rates for application to future charges in a business subject to regulation." The court relied upon the proposition that rate-fixing was legislative and not judicial, citing *Prentiss v. Atlantic Coast Line Co.*, 211 U. S. 210, 53 L. Ed. 150, 29 S. Ct. 67 (1908). On the other hand, the state supreme courts have not hesitated to review the decisions of public utility commissions fixing utility rates.

Tax assessments as made by the assessing officers are ordinarily made final by statute, except for administrative appeals to boards of equalizations and tax commissions, and this is not objectionable under the Constitution. *Board of County Commissioners of Finney County v. Bullard*, 77 Kan. 349, 94 Pac. 129 (1908), 16 L. R. A. (N. S.) 807 and note.

But in some states statutes have provided for judicial review of assessments without the constitutional objection that assessment is a nonjudicial function being successfully advanced. See *In the Matter of the Appeal from the Assessment Against the Sioux City Stock Yards Co.*, 149 Iowa 5, 127 N. W. 1102 (1910).

In *Chicago & Southern Air Lines v. Waterman Steamship Corp.*, 333 U. S. 103, 92 L. Ed. 568, 68 S. Ct. 431 (1948), the court held that certain orders of the Civil Aeronautics Board were not subject to judicial review. The statute which was involved had two sets of provisions. One was applicable when a foreign carrier asked for permission to establish an air line; the other was applicable when a citizen carrier asked for permission to establish an overseas or foreign air line. In both cases, it was provided that the order of the C.A.B. must be submitted to the President of the United States before publication. In the case of applications by a foreign carrier, it was provided that there would be no judicial review. However, in the case of applications by a citizen carrier, the statute provided that judicial review should be available. Despite this provision, the court held that it could not review an order involving a citizen carrier.

The court conceded that a literal reading of the statute subjected the order

## SECTION 5. STANDING TO SEEK REVIEW

**Perkins v. Lukens Steel Co., Supreme Court of the United States, 1940. 310 U. S. 113, 84 L. Ed. 1108, 60 S. Ct. 869.**

Action by the Lukens Steel Company and others against Frances Perkins, individually and as Secretary of Labor of the United States, and others, for an injunction restraining defendants from continuing in effect a determination made pursuant to Public Contracts Act, 41 USCA § 35 et seq. A judgment dismissing the complaint was reversed by the United States Court of Appeals for the District of Columbia, 70 App. D. C. 354, 107 F. (2d) 627 and Frances Perkins and others bring certiorari.

MR. JUSTICE BLACK delivered the opinion of the court.

In exercise of its authority to determine conditions under which purchases of Government supplies shall be made, Congress passed the Public Contracts Act of June 30, 1936. By virtue of that Act, sellers must agree to pay employees engaged in producing goods so purchased "not less than the minimum wages as determined by the Secretary of Labor to be the prevailing minimum wages for persons employed on similar work or in the particular or similar industries or groups of industries currently operating in the locality in which the . . . supplies . . . are to be manufactured or furnished under said contract." The Court of Appeals for the District of Columbia has held that the Secretary erroneously construed the term "locality" to include a larger geographical area than the Act contemplates, and has ordered six Members of the Cabinet including the Secretary of Labor, the Director of Procurement and all other officials responsible for purchases necessary in the operation of the Federal Government, not to abide by or give effect to the wage determination made by the Secretary for the iron and steel industry either as to the complaining companies or any

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to re-examination by the court, but held that nevertheless judicial review should be denied. The court said that judicial review of the Board's recommendation prior to the submission thereof to the President would not be possible because of the general principle that administrative orders are not reviewable unless and until "they impose an obligation, deny a right, or fix some legal relationship as a consummation of the administrative process." Nor was judicial review to be made available after the President had acted and the order had become final because "the final orders embody Presidential discretion as to political matters beyond the competence of the courts to adjudicate."

Four Justices (Douglas, Black, Reed and Rutledge) dissented. They took the position that after the President had acted, and the order had become final, the court should review the action of the Board. Under their theory the court would not review the President's discretion, but would only review the matters on which the Board had passed. If the court found that the order of the Board was invalid, then subsequent presidential approval could not validate the Board's order.

others. In this vital industry, by action of the Court of Appeals for the District of Columbia, the Act has been suspended and inoperative for more than a year.

We must, therefore, decide whether a Federal court, upon complaint of individual iron and steel manufacturers, may restrain the Secretary and officials who do the Government's purchasing from carrying out an administrative wage determination by the Secretary, not merely as applied to parties before the court, but as to all other manufacturers in this entire nation-wide industry. Involving, as it does, the marking of boundaries of permissible judicial inquiry into administrative and executive responsibilities, this problem can best be understood against the background of what took place before the Court of Appeals for the District acted:

July 11, 1938, all the iron and steel companies in the United States were given notice that the Secretary contemplated proceedings for determining the minimum prevailing wage for their industry. On the 25th and 26th of that month, hearings were had before the Public Contracts Board also functioning under the Act. Many companies, and all of those involved here, were represented in the hearings. Companies from the entire United States filed briefs and submitted information and suggestions, and these producers who are parties here had notice of and actively participated in the various stages of the proceedings. After the hearing, time for filing of briefs was allowed. Following investigation of testimony, exhibits, letters, telegrams, briefs, data from the Bureau of Labor Statistics, and arguments of representatives of both labor and industry itself, the Board, October 27, 1938, made its findings of fact, conclusions and recommendations. . . .

The majority of the Board suggested two localities, one for the Southern States and another for the remainder of the steel producing States. One member disagreed and insisted upon four localities throughout the nation, but noted that "the Board is agreed on all the essential facts before it in the case." . . . Excepting to the Board's recommendations, the companies now before this court urged that the Secretary make a finding of minimum prevailing wages with "locality" given the connotation of a subdivision of the respective States as originally provided in the Bacon-Davis Act.

On December 20, 1938, the Assistant Secretary of Labor, acting for the Secretary, heard arguments and received briefs both from industry and labor organizations. He did not adopt the recommendations of the Board in full, but instead divided the industry of the entire country into six "localities," proceeding, however, upon the view that to construe "locality" to mean small political divisions of the States, as the Bacon-Davis Act had done in express terms, would render "effective administration of the Act . . . almost impossible." It was pointed out that "this narrowly restricted construction of the word 'locality'

. . . is contrary to the administrative construction consistently adhered to by the Secretary of Labor in the administration of the Act," and that while Congress had closely followed the language of the Davis-Bacon Act in some respects, it had "carefully avoided the use of the more narrowly restrictive language of 'city, town, village or other civil subdivision.'" . . .

In their bill for an injunction and a declaratory judgment, these seven producers of iron and steel (respondents here) sought to enjoin as individuals and in their official capacities, the Secretaries of the Labor, Treasury, War, Navy, and Interior Departments, the Postmaster General, the Director of Procurement of the Treasury Department, the Assistant Secretary of Labor, and the Administrator of the Division of Public Contracts of the Department of Labor and their "officers, agents, assistants, employees, representatives and attorneys, and any one associated with or acting in concert or participation with them, or any of them, and their officers," etc. The seven companies named as complainants by the bill did not merely pray relief for themselves against the Secretary's wage determination but insisted that all these Government officials be restrained from requiring the statutory stipulation as to minimum wages in contracts with any other steel and iron manufacturers throughout the United States.

The District Court declined to interfere so sweepingly with the administration of the Act, even in the temporary restraining order which it granted. Its order ran only against the Secretaries of Labor and the Navy, and specifically limited its benefits to but three of the complaining companies. Recitals in the order indicate that only the Secretary of the Navy had actually solicited bids and that only those three companies were "desirous of bidding." After hearing, this order was dissolved and the court granted a motion to dismiss the complaint for lack of jurisdiction, inadequacy of the complaint, lack of standing to sue, and because the suit was one against the United States without its consent. A stay pending appeal was denied by the District Court, but the Court of Appeals for the District of Columbia, Justice Edgerton dissenting, by temporary injunction granted the sweeping prayer that all the Government officials and agents designated in the bill be restrained from continuing in effect the Determination made by the Secretary of Labor. By motion for reargument, the restrained officials, represented by attorneys of the Government, asked that the injunction be clarified so as to be "restricted to enjoining enforcement of the Determination against parties to this proceeding . . . and . . . not be extended to other bidders, not parties to this action, and who, for all that appears, may desire to abide by the Determination." In the same motion, the Government asked that employees who might be irreparably injured be protected by "a bond or other security to pay the minimum wages if the appellants do not eventually succeed in this case." The record



discloses no action by the Court of Appeals on this motion or on a subsequent motion to dissolve the temporary injunction. But the temporary injunction, rendering the Act wholly inoperative as to the iron and steel industry was kept in effect and, reversing the District Court, the Court of Appeals, Justice Edgerton again dissenting, remanded with instructions that relief as prayed in the bill be granted.

In our judgment the action of the Court of Appeals for the District of Columbia goes beyond any controversy that might have existed between the complaining companies and the Government officials. The benefits of its injunction, and of that ordered by it, were not limited to the potential bidders in the "locality," however construed, in which the respondents do business. All Government officials with duties to perform under the Public Contracts Act have been restrained from applying the wage determination of the Secretary to bidders throughout the Nation who were not parties to any proceeding, who were not before the court and who had sought no relief.

As a result of this judicial action, Federal officials had no feasible alternative except to make contracts for imperatively needed supplies for the War and Navy Departments without inclusion of the stipulation which Congress had required. The Public Contracts Act, so far as the steel industry is concerned, has been suspended for more than a year, with no bond or security to protect the public's interest in the maintenance of wage standards contemplated by Congress, should the suspension ultimately appear unwarranted or unauthorized. Here, and below, the Government has challenged the right of the judiciary to take such action, alleging that it constitutes an unwarranted interference with deliberate legislative policy and with executive administration vital to the achievement of governmental ends, at the instance of parties whose rights the Government has not invaded and who have no standing in court to attack the Secretary's determination. The manifestly far-reaching importance of the questions thus raised prompted us to grant certiorari.

Of the six "localities" into which the Secretary's determination divided the steel industry, respondents do business in that consisting of Ohio, Pennsylvania, Delaware, Maryland, Kentucky, New Jersey, New York, Connecticut, Rhode Island, Massachusetts, Vermont, New Hampshire, Maine, the District of Columbia, and a part of West Virginia. Their stated grievance was that the construction given to the term "locality" by the Secretary amounted to "a plain error of law in interpreting the Act, . . . and, consequently, in purporting . . . to determine the prevailing minimum wages for persons employed in the manufacture . . . of the iron and steel industry in the six so-called 'localities' set forth in this determination [the Secretary] acted arbitrarily and capriciously and wholly without warrant or authority in law." In particular, the complaint alleged—Respondents had been

selling their products to agents of the United States for many years; they wished to continue to bid on Government contracts; their minimum wages had ranged from 53¢ to 56½¢ per hour; if required to pay the 62½¢ per hour minimum rate determined by the Secretary there was grave danger that they would be unable successfully to compete with others for Government contracts; they had a legal right to bid for Government contracts free from any obligation to abide by the minimum wage determination because of alleged illegal administrative construction of "locality"; and if denied the right to bid without paying their employees this minimum wage they would suffer "irreparable and irrecoverable damages" for which the law provided no "plain, adequate or complete remedy."

In staying the effect of the administrative wage determination, the Court of Appeals for the District was of the opinion that "the word locality is one of somewhat indefinite meaning" requiring the Secretary to exercise judgment and discretion "within the proper limits of the meaning of locality," but held that the Secretary's determination in this case went "so far beyond any possible proper application of the word as to defeat its meaning and to constitute an attempt arbitrarily to disregard the statutory mandate." [107 F. (2d) 630.]

We are of opinion that no legal rights of respondents were shown to have been invaded or threatened in the complaint upon which the injunction of the Court of Appeals was based. It is by now clear that neither damage nor loss of income in consequence of the action of Government, which is not an invasion of recognized legal rights, is in itself a source of legal rights in the absence of constitutional legislation recognizing it as such. It is not enough that the Secretary of Labor is charged with an erroneous interpretation of the term "locality" as an element in her wage determination. Nor can respondents vindicate any general interest which the public may have in the construction of the Act by the Secretary and which must be left to the political process. Respondents, to have standing in court, must show an injury or threat to a particular right of their own, as distinguished from the public's interest in the administration of the law. They claim a standing by asserting that they have particular rights under and even apart from statute to bid and negotiate for Government contracts free from compliance with the determination made by the Secretary of Labor for their industry. Respondents point to Section 3709 of the Revised Statutes, 41 USCA § 5, and to the Public Contracts Act itself.

Section 3709 of the Revised Statutes requires for the Government's benefit that its contracts be made after public advertising. It was not enacted for the protection of sellers and confers no enforceable rights upon prospective bidders. "The United States needs the protection of publicity, form, regularity of returns and affidavit (Rev. Stat., §§ 3709, 3718-3724, 3745-3747 [34 USCA §§ 561-563, 570, 572-574, 41 USCA

§§ 5, 17-19]), in order to prevent possible frauds upon it by officers. A private person needs no such protection against a written undertaking signed by himself. The duty is imposed upon the officers of the government, not upon him." That duty is owing to the Government and to no one else.

Like private individuals and businesses, the Government enjoys the unrestricted power to produce its own supplies, to determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases. Acting through its agents as it must of necessity, the Government may for the purpose of keeping its own house in order lay down guide posts by which its agents are to proceed in the procurement of supplies, and which create duties to the Government alone. It has done so in the Public Contracts Act. That Act does not depart from but instead embodies the traditional principle of leaving purchases necessary to the operation of our Government to administration by the executive branch of Government, with adequate range of discretion free from vexations and dilatory restraints at the suits of prospective or potential sellers. It was not intended to be a bestowal of litigable rights upon those desirous of selling to the Government; it is a self-imposed restraint for violation of which the Government—but not private litigants—can complain. Thus, a wage determination by the Secretary contemplates no controversy between parties and no fixing of private rights; the process of arriving at a wage determination contains no semblance of these elements which go to make up a litigable controversy as our law knows the concept. Courts have never reviewed or supervised the administration of such an executive responsibility even where executive duties "require an interpretation of the law." Judicial restraint of those who administer the Government's purchasing would constitute a break with settled judicial practice and a departure into fields hitherto wisely and happily apportioned by the genius of our polity to the administration of another branch of Government.

This Act's purpose was to impose obligations upon those favored with Government business and to obviate the possibility that any part of our tremendous national expenditures would go to forces tending to depress wages and purchasing power and offending fair social standards of employment. As stated in the Report of the House Committee on the Judiciary on the Bill, "The object of the bill is to require persons having contracts with the Government to conform to certain labor conditions in the performance of the contracts and thus to eliminate the practice under which the Government is compelled to deal with sweat shops."

We find nothing in the Act indicating any intention to abandon a principle acted upon since the Nation's founding under which the legislative and executive departments have exercised complete and final authority to enter into contracts for Government purchases. The Committee Hearings and Reports and the construction of the measure by its

sponsors disclose no purpose to invoke judicial supervision over agents chosen by Congress to perform these duties. And Sections 4 and 5, 41 USCA §§ 38, 39, do not subject a wage determination to such review. Provision for hearings and findings by the Secretary with respect to decisions upon breaches of stipulations by contractors, once purchases have been made, is indicative of a lack of intention to create any rights for prospective bidders before a purchase is concluded.

The Act does not represent an exercise by Congress of regulatory power over private business or employment. In this legislation Congress did no more than instruct its agents who were selected and granted final authority to fix the terms and conditions under which the Government will permit goods to be sold to it. The Secretary of Labor is under a duty to observe those instructions just as a purchasing agent of a private corporation must observe those of his principal. In both instances prospective bidders for contracts derive no enforceable rights against the agent for an erroneous interpretation of the principal's authorization. For erroneous construction of his instructions, given for the sole benefit of the principal, the agent is responsible to his principal alone because his misconstruction violates no duty he owes to any but his principal. The Secretary's responsibility is to superior executive and legislative authority. Respondents have no standing in court to enforce that responsibility or to represent the public's interest in the Secretary's compliance with the Act. That respondents sought to vindicate such a public right or interest is made apparent both by their prayer that the determination be suspended as to the entire steel industry and by the extent of the injunction granted.

The contested action of the restrained officials did not invade private rights in a manner amounting to a tortious violation. On the contrary, respondents in effect seek through judicial action to interfere with the manner in which the Government may dispatch its own internal affairs. And in attempted support of the injunction granted they cite many cases involving contested Government regulation of the conduct of private business. Their cited cases, however, all relate to problems different from those inherent in the imposition of judicial restraint upon agents engaged in the purchase of the Government's own supplies.

The Government can supply its needs by its own manufacturing or by purchase. And Congress can as it always has, either do the purchasing of the Government's goods and supplies itself, or it can entrust its agents with final power to do so and make these agents responsible only to it. Courts should not, where Congress has not done so, subject purchasing agencies of Government to the delays necessarily incident to judicial scrutiny at the instance of potential sellers, which would be contrary to traditional governmental practice and would create a new concept of judicial controversies. A like restraint applied to purchasing by private

business would be widely condemned as an intolerable business handicap. It is, as both Congress and the courts have always recognized, essential to the even and expeditious functioning of Government that the administration of the purchasing machinery be unhampered. The Constitution prohibits appropriations for the Army for more than two years, and by statute contracts for the purchase of Departmental supplies are in general limited to one year. These prohibitions emphasize the grave importance of leaving the restraint of the Government's purchasing agents to Congress and their executive superiors.

The record here discloses the "confusion and disorder" that can result from the delays necessarily incident to judicial supervision of administrative procedure developed to meet present day needs of Government and capable of operating efficiently and fairly to both private and public interests. In the appropriate words of Mr. Justice Sutherland, "The bare suggestion of such a result, with its attendant inconveniences, goes far to sustain the conclusion which we have reached, that a suit of this character cannot be maintained." For more than a year, Cabinet officers and their subordinates have been enjoined from making the Secretary's determination of minimum wages effective. Meanwhile, iron and steel were needed for the Army and Navy. In order that the military program could proceed, the declared policy of the Congress was abandoned under judicial compulsion and contracts without a minimum wage stipulation have been awarded for more than \$65,000,000.00 worth of iron and steel products since the injunction issued. If the general law permits prospective bidders to challenge each wage determination of the Secretary in the courts, by a like token all employees affected could obtain judicial review. Such a possibility places in bold relief those conditions which led Congress to proceed in this Act upon the belief, to which we have recently alluded, that "legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts."

The case before us makes it fitting to remember that "The interference of the courts with the performance of the ordinary duties of the executive departments of the government, would be productive of nothing but mischief; and we are quite satisfied, that such a power was never intended to be given to them."

The District Court properly dismissed the bill and the Circuit Court of Appeals for the District of Columbia was in error in finding respondents with standing to bring this action, in ordering the Secretary's determination restrained and in holding respondents entitled to declaratory judgment.

Our decision that the complaining companies lack standing to sue does not rest upon a mere formality. We rest it upon reasons deeply rooted in the constitutional divisions of authority in our system of Gov-

ernment and the impropriety of judicial interpretations of law at the instance of those who show no more than a mere possible injury to the public. The judgment of the Court of Appeals is reversed, and that of the District Court dismissing the bill is affirmed.

Reversed.<sup>7</sup>

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<sup>7</sup> For a careful and complete description of practice and procedure under the Walsh-Healey Act, see an article by W. Gellhorn, and S. L. Linfield, "Administrative Adjudication of Contract Disputes: The Walsh Healey Act," 37 Mich. L. Rev. 841 (1939); for comment on the Perkins case, see 26 Corn. L. Q. 298 (1941).

The years have brought to light various attempts to express a philosophy of administrative adjudication in relation to judicial review—a philosophy that will orient the two processes with respect to each other in a reasonably satisfactory manner, allocating to each its proper sphere. Judge Joseph C. Hutcheson, Jr., United States Circuit Judge, Fifth Circuit, effectively expressed his own very competent views in an address presented in 1942 to the Administrative Law Section of the State Bar of Texas—"Judging as Administration, Administration as Judging," 21 Tex. L. Rev. 1 (1942). He said: "It is sufficient to say that lawyers, law teachers, judges, bar associations, judicial councils, attorney generals, federal and state, everybody at last accepting the fact that for better or for worse administrative adjudication as a part of an administro-judicial process has come to stay, the great controversy raged around the extent and nature of the judicial review of the facts. No one at last denied that there should be a review of questions of law, the traditional judiciary review. But there were about as many views as there were viewers as to the extent to which administrative adjudication of the facts should be final and as to the nature of the judicial review of them. One school of thought wanted merely advisory or preliminary findings with full review; another wanted no review at all. Some of those in this school wanted the "no review" to extend to whether as matter of law there was or was not substantial evidence in support of the findings. In the main, however, there was a general willingness to leave to the administrative the determination of primary questions of fact and of the fact inferences they gave rise to. The great controversy was over whether these findings should have the effect and finality of jury findings, should be reviewed as the findings of a judge in equity and in admiralty cases were or as the findings of a judge are now reviewed under Federal Rule of Civil Procedure 52, the findings to stand unless clearly erroneous. For the purpose of this paper these varying views are unimportant. What is important is that the administrative and judicial tribunals making up this statutory hierarchy be understood to be, and ungrudgingly recognized as parts of a complete system of administering justice, and that, instead of the administrative findings being made with an antagonistic attitude toward their review in the courts and the judicial review proceeding under a distrustful or antagonistic approach, administrators and judges will, as trial and appellate tribunals do, work as parts of one harmonious system and in complete sympathy with each other. If such an esprit can be developed, if the administrators in adjudicating the facts will approach their part of the work not partisanly and with an eye too single to the immediate task in hand but fairly and in accordance with the highest standards of judicial integrity and impartiality, and if in reviewing their findings the courts will review them in the

**United States v. Wunderlich et al., Supreme Court of the United States, 1951. 342 U. S. 98, 96 L. Ed. 113, 72 S. Ct. 154.**

MR. JUSTICE MINTON delivered the opinion of the court.

This court is again called upon to determine the meaning of the "finality clause" of a standard form government contract. Respondents agreed to build a dam for the United States under a contract containing the usual "Article 15." That Article provides that all disputes involving questions of fact shall be decided by the contracting officer, with the right of appeal to the head of the department "whose decision shall be final and conclusive upon the parties thereto." Dissatisfied with the resolution of various disputes by the department head, in this instance the Secretary of the Interior, respondents brought suit in the Court of Claims. That court reviewed their contentions, and in the one claim involved in this proceeding set aside the decision of the department head. 117 Ct. Cl. 92. Although there was some dispute below, the parties now agree that the question decided by the department head was a question of fact. We granted certiorari, 341 U. S. 924, 71 S. Ct. 795, 95 L. Ed. 1356 to clarify the rule of this court which created an exception to the conclusiveness of such administrative decision.

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same spirit in which they review fact findings judicially made, the tumult and the shouting will die. Then statutes providing for administrative adjudication with judicial review, instead of being regarded as joining two heterogeneous systems in mortal combat, will be regarded as providing for one truly homogeneous legal system, organized and, therefore, functioning as such.

"That this recognition has in some quarters already come about and that it will grow and widen with accelerated pace may not be doubted. It is a short space in time but a far cry in spirit from the almost denunciatory language of the last of the great fulminations against administrative usurpation [citing *Jones v. Securities & Exchange Commission*, 298 U. S. 1, 80 L. Ed. 1015, 56 S. Ct. 654 (1936)], to the equally vigorous if not as denunciatory language in which the Supreme Court [citing several decisions reviewing N. L. R. B. orders], as the head of the administro-judicial hierarchy defines the proper place in it of the judicial and the administrative and, with at least a little fillip toward the administrative, undertakes to mark out for and confine the courts within their sphere. It is a far cry too from the over-emphasis these decisions place on the administrative, in contrast with the judicial, function in these statutory schemes to the complete and truer picture drawn in *Southern Steamship Company v. N. L. R. B.* [62 Sup. Ct. 886 (1942)], following the lead of the Supreme Court in *United States v. Morgan* [307 U. S. 183, 83 L. Ed. 1211, 59 S. Ct. 795 (1939)]."

For recent law review comment on the question of standing to seek judicial review, see Schwartz, "A Decade of Administrative Law: 1942-1951," 51 Mich. L. Rev. 775, 847 (1953); Davis, "Standing to Challenge Governmental Action," 39 Minn. L. Rev. 353 (1955); Comment, "Standing to Protest Before the FCC," 55 Columbia L. Rev. 209 (1955); Comment, "The Doctrine of Indispensable Parties as Applied in Review of Administrative Action," 103 U. of Pa. L. Rev. 238 (1954).

The same Article 15 of a government contract was before this court recently, and we held, after a review of the authorities, that such Article was valid. *United States v. Moorman*, 338 U. S. 457, 70 S. Ct. 288, 94 L. Ed. 256. Nor was the *Moorman* case one of first impression. Contracts, both governmental and private, have been before this court in several cases in which provisions equivalent to Article 15 have been approved and enforced "in the absence of fraud or such gross mistake as would necessarily imply bad faith, or a failure to exercise an honest judgment . . ." *Kihlberg v. United States*, 97 U. S. 398, 402, 24 L. Ed. 1106; *Sweeney v. United States*, 109 U. S. 618, 620, 3 S. Ct. 344, 27 L. Ed. 1053; *Martinsburg & P. R. Co. v. March*, 114 U. S. 549, 553, 5 S. Ct. 1035, 1037, 29 L. Ed. 255; *Chicago, S. F. & C. R. Co. v. Price*, 138 U. S. 185, 195, 11 S. Ct. 290, 292, 34 L. Ed. 917.

In *Ripley v. United States*, 223 U. S. 695, 704, 32 S. Ct. 352, 356, 56 L. Ed. 614, gross mistake implying bad faith is equated to "fraud." Despite the fact that other words such as "negligence," "incompetence," "capriciousness," and "arbitrary" have been used in the course of the opinions, this court has consistently upheld the finality of the department head's decision unless it was founded on fraud, alleged and proved. So fraud is in essence the exception. By fraud we mean conscious wrongdoing, an intention to cheat or be dishonest. The decision of the department head, absent fraudulent conduct, must stand under the plain meaning of the contract.

If the [conclusiveness of the findings] . . . under Article 15 is to be set aside for fraud, fraud should be alleged and proved, as it is never presumed. *United States v. Colorado Anthracite Co.*, 225 U. S. 219, 226, 32 S. Ct. 617, 620, 56 L. Ed. 1063. In the case at bar, there was no allegation of fraud. There was no finding of fraud nor request for such a finding. The finding of the Court of Claims was that the decision of the department head was "arbitrary," "capricious," and "grossly erroneous." But these words are not the equivalent of fraud, the exception which this court has heretofore laid down and to which it now adheres without qualification.

Respondents were not compelled or coerced into making the contract. It was a voluntary undertaking on their part. As competent parties they have contracted for the settlement of disputes in an arbitral manner. This, we have said in *Moorman*, Congress has left them free to do. *United States v. Moorman*, *supra*, 338 U. S. at page 462, 70 S. Ct. 291. The limitation upon this arbitral process is fraud, placed there by this court. If the standard of fraud that we adhere to is too limited, that is a matter for Congress.

Since there was no pleading of fraud, and no finding of fraud, and no request for such a finding, we are not disposed to remand the case



for any further findings, as respondents urge. We assume that if the evidence had been sufficient to constitute fraud, the Court of Claims would have so found. In the absence of such finding, the decision of the department head must stand as conclusive, and the judgment is reversed.

Reversed.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE REED concurs, dissenting.

Law has reached its finest moments when it has freed man from the unlimited discretion of some ruler, some civil or military official, some bureaucrat. Where discretion is absolute, man has always suffered. At times it has been his property that has been invaded; at times, his privacy; at times, his liberty of movement; at times, his freedom of thought; at times, his life. Absolute discretion is a ruthless master. It is more destructive of freedom than any of man's other inventions.

The instant case reveals only a minor facet of the age-long struggle. The result reached by the court can be rationalized or made plausible by casting it in terms of contract law: the parties need not have made this contract; those who contract with the Government must turn square corners; the parties will be left where their engagement brought them. And it may be that in this case the equities are with the Government, not with the contractor. But the rule we announce has wide application and a devastating effect. It makes a tyrant out of every contracting officer. He is granted the power of a tyrant even though he is stubborn, perverse or captious. He is allowed the power of a tyrant though he is incompetent or negligent. He has the power of life and death over a private business even though his decision is grossly erroneous. Power granted is seldom neglected.

The principle of checks and balances is a healthy one. An official who is accountable will act more prudently. A citizen who has an appeal to a body independent of the controversy has protection against passion, obstinacy, irrational conduct, and incompetency of an official. The opinion by Judge Madden in this case expresses a revulsion to allowing one man an uncontrolled discretion over another's fiscal affairs. We should allow the Court of Claims, the agency close to these disputes, to reverse an official whose conduct is plainly out of bounds whether he is fraudulent, perverse, captious, incompetent, or just palpably wrong. The rule we announce makes government oppressive. The rule the Court of Claims espouses gives a citizen justice even against his government.

MR. JUSTICE JACKSON, dissenting.

It is apparent that the Court of Claims, which deals with many such cases while we deal with few, has reached a conclusion that contracting

officers and heads of departments sometimes are abusing the power of deciding their own law suits which these contract provisions give to them. It also is apparent that the Court of Claims does not believe that our decision in *United States v. Moorman*, 338 U. S. 457, 70 S. Ct. 288, 94 L. Ed. 256, completely closed the door to judicial relief from arbitrary action unless it also is fraudulent in the sense of "conscious wrongdoing, an intention to cheat or be dishonest." Nor could I have believed it.

Granted that these contracts are legal, it should not follow that one who takes a public contract puts himself wholly in the power of contracting officers and department heads. When we recently repeated in *Moorman* that their decisions were "conclusive, unless impeached on the ground of fraud, *or such gross mistake as necessarily implied bad faith*", *id.*, 338 U. S. at page 461, 70 S. Ct. at page 290 [emphasis supplied], I supposed that we meant that part of the reservation for which I have supplied emphasis. Today's decision seems not only to read that out of the *Moorman* decision, but also to add an exceedingly rigid meaning to the word "fraud."

Undoubtedly contracting parties can agree to put decision of their disputes in the hands of one of them. But one who undertakes to act as a judge in his own case or, what amounts to the same thing, in the case of his own department, should be under some fiduciary obligation to the position which he assumes. He is not at liberty to make arbitrary or reckless use of his power, nor to disregard evidence, nor to shield his department from consequences of its own blunders at the expense of contractors. He is somewhat in the position of the lawyer dealing with his client or the doctor with his patient, for the superiority of his position imposes restraints appropriate to the trust. Though the contractor may have covenanted to be satisfied with what his adversary renders to him, it must be true that he who bargains to be made judge of his own cause assumes an implied obligation to do justice. This does not mean that every petty disagreement should be readjudged, but that the courts should hold the administrative officers to the old but vanishing standard of good faith and care.

I think that we should adhere to the rule that where the decision of the contracting officer or department head shows "such gross mistake as necessarily to imply bad faith" there is a judicial remedy even if it has its origin in overzeal for the department, negligence of the deciding official, misrepresentations—however innocent—by subordinates, prejudice against the contractor, or other causes that fall short of actual corruption. Men are more often bribed by their loyalties and ambitions than by money. I still believe one should be allowed to have a judicial hearing before his business can be destroyed by administrative action,

although the court again thinks otherwise. Cf. *Ewing v. Mytinger & Casselberry, Inc.*, 339 U. S. 594, 604, 70 S. Ct. 870, 875, 94 L. Ed. 1088.<sup>8</sup>

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<sup>8</sup> The rule of this case was subjected to critical appraisal in law review articles, in American Bar Association committees, and finally in the halls of Congress. On May 11, 1954, some two and a half years after the decision was handed down, there was enacted Ch. 199, P. L. 356, declaring:

" . . . no provision of any contract entered into by the United States, relating to the finality or conclusiveness of any decision of the head of any department or agency or his duly authorized representative or board in a dispute involving a question arising under such contract, shall be pleaded in any suit now filed or to be filed as limiting judicial review of any such decision to cases where fraud by such official or his said representative or board is alleged: *Provided, however,* That any such decision shall be final and conclusive unless the same is fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence.

"Sec. 2. No Government contract shall contain a provision making final on a question of law the decision of any administrative official, representative, or board."

## CHAPTER VIII

### METHODS AND TIMING OF JUDICIAL RELIEF

#### SECTION 1. PROCEDURES TO OBTAIN JUDICIAL REVIEW

The method of review has more than mere procedural importance, for the extent of review is often controlled by limitations inherent in the procedural method by which the question is presented to the reviewing court.

##### Judicial Review Provided by Statute

In most of the well-developed acts creating administrative tribunals with quasi-judicial powers, the course of and procedure for judicial review of the administrative decisions are outlined in considerable detail.

Obviously, if the statutory method of review is deemed exclusive, it may operate to limit the scope of review, because the statutory procedure may be inappropriate for the raising of certain questions that could be raised if other procedural devices were available.

Will the statutory method be deemed to provide the exclusive procedure for seeking review? See *Federal Power Commission v. Metropolitan Edison Co.*, 304 U. S. 375, 82 L. Ed. 1408, 58 S. Ct. 963 (1938); *United Employees Ass'n v. National Labor Relations Board* (CCA 3rd, 1938), 96 F. (2d) 875; *Arrow Distilleries, Inc. v. Alexander*, 306 U. S. 615, 83 L. Ed. 1023, 59 S. Ct. 489 (1939); *Securities & Exchange Commission v. Andrews* (CCA 2nd, 1937), 88 F. (2d) 441.

*Should* the statutory method be deemed exclusive? Or should provision be made—perhaps in the statute itself—that if the statutory method is inadequate, any applicable form of legal action may be availed of? In this connection, consider the provisions of section 10 (b) and 10 (d) of the Federal Administrative Procedure Act; and section 12 (1) of the Model State Administrative Procedure Act. The Hoover Commission Task Force on Legal Services and Procedures concluded (1955 Report, p. 211):

“ . . . [t]he form of action for judicial review should be simplified. Aside from the review afforded when an agency seeks enforcement of, or compliance with, an order, or in proceedings where a statute expressly requires appeal to any specially constituted or other named

court, all other cases for review of agency action should be commenced by the filing of a petition for review in a United States district court. The petition should contain the grounds upon which jurisdiction and venue are based, a concise and plain statement of the facts upon which petitioner bases his claim to have been adversely affected or aggrieved, the reasons claimed for such relief, and the relief sought."

The scope of review obtainable is normally adverted to in statutes setting up a method for review; but not always in such language as to foreclose judicial determination of the actual scope of review. What would be the scope of review, for example, under a statutory provision such as that found in the Wisconsin Public Utilities Act (ch. 196, Wis. Stat. 1935), authorizing judicial relief if the administrative order "is unlawful or unreasonable"? Would the scope of review under such a statute necessarily be any broader than that available under section 10 (e) of the Federal Administrative Procedure Act? Might it be more narrow? Sometimes, these statutory provisions are, to say the least, mildly puzzling. In Michigan, for example, where at least ten methods of judicial review are provided with respect to the eight agencies which produce most of the grist for the judicial mill [see Cooper "The Administrative Law of Michigan," 36 A. B. A. J. 527, 595 (1950)], the Legislature, with happy unconcern for mere procedural difficulties, decreed that appeals from the State Aeronautics Commission should be prosecuted "in the manner provided for the review of the orders of other administrative bodies of this state" [Mich. Stats. Ann. § 10.302].

Under such statutes, at least—and perhaps under others which purport to specify in detail the categories of reviewable acts and the scope or extent of review—it is up to the courts in the last analysis to determine the scope of review.

For an article reviewing the principal features of statutes prescribing methods of judicial review, see Stason "Methods of Judicial Relief from Administrative Action," 24 A. B. A. J. 274 (1938).

### Judicial Review by Common-Law Writs

Sometimes, judicial review is available via the common-law writs of certiorari, mandamus or prohibition.

(a) *Certiorari*. Certiorari is not ordinarily available in the federal courts as a device to review administrative orders [Degge v. Hitchcock, 229 U. S. 162, 57 L. Ed. 1135, 33 S. Ct. 639 (1913); Public Clearing House v. Coyne, 194 U. S. 497, 48 L. Ed. 1092, 24 S. Ct. 789 (1904)]. In the state courts, it is perhaps the most commonly employed device to review orders of state tribunals. While the scope of review available on certiorari differs widely from one state to another—and, indeed, as between one tribunal and another within the same state—its general scope and purpose is indicated by Milwaukee Iron Co. v. Schubel, 29 Wis. 444 (1872), where the court said:

"In this state, the common-law writ has almost invariably been brought to review the proceedings and judgments of justices of the peace, and this court has, with much uniformity, declined to consider upon such writ any but jurisdictional questions, or such questions of law as might arise upon the docket entries of the justice. . . . But, in proceedings of a summary character and out of the course of the common law, like the proceedings of the board of review under our statute, in which powers are exercised affecting valuable rights of property, and where there can be no direct review of their determination unless upon a common-law writ of certiorari, whatever errors they may commit, and however clear it may be upon the undisputed facts that their decision is erroneous, there a different practice may well obtain. . . . This court can go beyond that question [jurisdiction] and inquire whether the board was guilty of any excess of jurisdiction, and consequently may look into the record, or what is of the nature of a record, to see if the board in its decision violated its duty and the rules of law prescribed for its action. . . . Therefore, whatever questions arise upon the face of the record, or whatever errors of law the board committed may be reviewed."

It is ordinarily held that certiorari is available only where there is no other adequate remedy. Further, the availability of judicial relief by way of certiorari is limited by the doctrine that the writ will lie only where the decision of the agency is judicial in character, rather than legislative or purely administrative. All these limitations are troublesome. For example, denial of a certificate of convenience and necessity to a public utility has been described as judicial [*People ex rel. Steward v. Board of Railroad Com'rs*, 160 N. Y. 202, 54 N. E. 697 (1899)]; and, conversely, the revocation of such a certificate has been described as nonjudicial [*People ex rel. Keating v. Bingham*, 138 App. Div. 736, 123 N. Y. Supp. 506 (1910); *Southeastern Greyhound Lines v. Georgia Public Service Commission*, 181 Ga. 75, 181 S. E. 834 (1935)]. To what extent are such conclusions influenced by (a) the court's judgment as to the desirability of reviewing a particular administrative determination; (b) the availability of other methods of review?

Still other problems beset the lawyer who seeks to review an agency determination by certiorari. Sometimes the writ lies to the state supreme court, sometimes to a lower court; and often it is uncertain where the application should be filed.

For a discussion of these and other problems, see Frank J. Goodnow, "The Writ of Certiorari," 6 Pol. Sci. Q. 493 (1891); and for a somewhat more recent and briefer discussion, "Review of Acts of Non-Judicial Bodies by Certiorari," 19 Iowa L. Rev. 609 (1934).

(b) *Mandamus*. This writ is available as a means of compelling an agency to perform a purely ministerial act where refusal to perform it violates a clearly established legal right [*People ex rel. McCabe v. Matthies*, 179 N. Y. 242, 72 N. E. 103 (1904)]. It can be utilized to compel an agency to assume jurisdiction over a case which it is clearly the duty of the agency to decide. [*Interstate Commerce Commission v.*

United States of America ex rel. Humboldt Steamship Co., 224 U. S. 474, 56 L. Ed. 849, 32 S. Ct. 556 (1912).] But it cannot ordinarily be used to compel an agency to resolve a question of fact or law one way or the other. A modicum of discretionary power is sufficient to render nugatory mandamus proceedings. [United States ex rel. Hall v. Payne, 254 U. S. 343, 65 L. Ed. 295, 41 S. Ct. 131 (1920).] Even where a strict legal right on the part of the petitioner can be shown, relief may be denied on the basis that mandamus is a discretionary remedy, which should not be granted unless the inconvenience to the government is more than counterbalanced by a resulting substantial benefit to the petitioner. [United States ex rel. Greathouse v. Dern, 289 U. S. 352, 77 L. Ed. 1250, 53 S. Ct. 614 (1933).]

Federal courts of original jurisdiction, except those of the District of Columbia, do not have a general power to issue writs of mandamus. A federal court may, however, issue the writ in aid of its jurisdiction over proceedings already commenced before it for some other purpose [Bath v. Amy, 13 Wall. (U. S.) 244, 20 L. Ed. 539 (1871)], or as empowered by statute in specific cases. State courts may not issue the writ against federal officers. [McClung v. Silliman, 6 Wheat. (U. S.) 598, 5 L. Ed. 340 (1821).]

For a general discussion of the availability of mandamus to review administrative proceedings, see Sherwood, "Mandamus to Review State Administrative Action," 45 Mich. L. Rev. 123 (1946).

(c) *Prohibition*. The writ of prohibition, where available, raises only the single question whether the agency, in connection with the performance of a judicial function, is unlawfully assuming a power it cannot legally exercise because beyond its jurisdiction. It will not issue to prevent the performance of executive or ministerial functions, in the absence of specific statutory provisions. [Butler v. Selectmen of Town of Wakefield, 269 Mass. 585, 169 N. E. 498 (1930); Speed v. Common Council of City of Detroit, 98 Mich. 360, 57 N. W. 406 (1894).] It is not available in the federal courts. See 34 Columbia L. Rev. 899 (1934).

### Judicial Review by Collateral Attack

The extremely limited scope of review which may be obtained by means of the common-law writs, and their unavailability in many situations, has led to the employment of various methods of collateral attack as a means of reviewing administrative determinations, in cases where no statutory method of review is provided or where the method of review provided by statute is deemed inadequate. Where resort is had to collateral attack, the problems most commonly encountered are (a) whether the application should be denied because petitioner should have pursued some other remedy, and (b) whether relief by way of collateral

attack is available where the administrative order is found to be merely erroneous, rather than fatally void. The usual methods employed are (a) actions for restitution, (b) suits for injunction, (c) damage actions against administrative officers.

(a) *Actions for Restitution.* Typical of this kind of collateral attack is the suit to recover taxes paid under protest. At common law, it was ordinarily held that such a proceeding could not be maintained unless the action of the administrative agency was void, rather than merely erroneous. In *United States Trust Co. of New York v. Mayor, etc., of City of New York*, 144 N. Y. 488, 39 N. E. 383 (1895), the court said:

" . . . where there was no jurisdiction in the taxing officers over the person and subject-matter to impose a tax at all, their assessment is void, and is a nullity, and an action at law will lie to recover back moneys paid in satisfaction of it; without first having it set aside. . . . But where, in the exercise of an actual jurisdiction over person and subject-matter, the taxing officers commit an error, their action, though reviewable in a proper proceeding, is not void, and their assessment is protected against collateral attack, as they themselves also would be."

In most of the states, and under some federal statutes, actions to recover taxes paid under protest are now controlled by specific statutory provisions, and the question as to the scope of review depends primarily on the statutory provisions.

(b) *Suits for Injunction.* Where a bill for injunction is utilized as a method of collateral attack (as distinguished from cases where it is a specified statutory method of review) it must normally be shown, in order to sustain the bill, that the agency action complained of is void (rather than merely erroneous), that irreparable injury would be suffered, and that there is no adequate remedy at law. Thus, where a tax statute was assailed as unconstitutional, so that the levy of any tax thereunder would be utterly void, and where it appeared that there was no other remedy to raise the question as to the validity of the tax, a bill for injunction was sustained in *Ohio Oil Co. v. Conway*, 279 U. S. 813, 73 L. Ed. 972, 49 S. Ct. 256 (1929). On the other hand, where it was sought to enjoin health officers from abating an alleged nuisance, the court held that since the bill alleged mere error of judgment on their part, and since other remedies were available, the bill would be dismissed. *Stone v. Heath*, 179 Mass. 385, 60 N. E. 975 (1901). Similarly, a bill may be dismissed where there is no proper showing of irreparable injury to plaintiff, or where other general doctrines of equity jurisdiction preclude injunctive relief. *California v. Latimer*, 305 U. S. 255, 83 L. Ed. 159, 59 S. Ct. 166 (1938).

In the federal courts, the equity injunction has been drawn into use as an effective substitute for the common-law writ of certiorari (which, as noted above, is not ordinarily available in the federal courts). "In



the review of the quasi-judicial decisions of the federal administrative tribunals the bill in equity serves the purpose which at common law, and under the practice of many of the states, is performed by writs of certiorari." Brandeis, J., in his dissenting opinion in *Crowell v. Benson*, 285 U. S. 22, 76 L. Ed. 598, 52 S. Ct. 285 (1932).

(c) *Damage Actions Against Administrative Officers.* Historically, one of the basic common-law remedies for the protection of an individual against illegal official action was an action for damages. If plaintiff could show that the action of the officer was a private wrong (not justifiable under the statute), he was entitled to damages. The remedy is still available; it is not infrequently employed in cases of false arrest, and in some other cases.

The older cases allowed recovery quite freely, not only for action under an unconstitutional statute, but also in cases where, because of a mistaken determination of fact, the officer took some action not authorized by the statute. Thus, where an officer was authorized to destroy diseased cattle and (on finding cattle to be diseased) destroyed them, but a jury later found that the cattle had not in fact been diseased, it was said that the officer had committed a wrong which could not be justified under the statute, and was therefore liable in damages. *Lowe v. Conroy*, 120 Wis. 151, 97 N. W. 942 (1904). But several courts found the results of this doctrine to be unsatisfactory. The danger of an administrative official subjecting himself to substantial personal liability—if a jury, trying the factual question *de novo* (and often on less complete evidence than that on which the officer acted) should determine the factual question differently than the officer had—was an obvious deterrent to vigilant administrative enforcement. Further, the theory of according greater weight to the jury's fact finding than to the factual determination of the administrative officer was completely at odds with fundamental tenets of administrative *expertise*. Consequently, as a means of avoiding the harsh results of the rule, some courts have developed a theory that where the administrative function is judicial in character, the administrative officer is exempt from liability so long as he acts within his jurisdiction and in good faith. See note, 34 Mich. L. Rev. 113 (1935); *Raymond v. Fish*, 51 Conn. 80 (1883); *Beeks v. Dickinson County*, 131 Iowa 244, 108 N. W. 311 (1906); *Williams v. Rivenburg*, 145 App. Div. 93, 129 N. Y. Supp. 473 (1911). Sometimes it is said that the immunity is available only where no property right is invaded, but courts have gone far in finding this requirement satisfied. For example, it was held in *Wasserman v. City of Kenosha*, 217 Wis. 223, 258 N. W. 857 (1935), that revocation of a building permit did not invade any property right.<sup>1</sup>

<sup>1</sup> Cf. Davis, "Sovereign Immunity in Suits Against Officers for Relief Other Than Damages," 40 Cornell L. Q. 3 (1954).

### **Actions for Declaratory Judgment**

Increasing attention has been given in recent years to the use of the declaratory judgment procedure for the purpose of securing judicial pronouncements, in advance, respecting the validity and application of administrative rules, or the existence of jurisdiction in an administrative agency.

In 1941, the Attorney General's Committee on Administrative Procedure pointed out:

"Since June, 1934, the federal courts have been empowered to grant declaratory judgments in 'cases of actual controversy.' While this proceeding has not yet been extensively used to bring federal administrative action before the federal courts, its potentialities are indicated by its wide use in other fields" (Sen. Doc. 8, 77th Congress, 1st Sess. p. 81).

The Federal Administrative Procedure Act in section 10 (b) reaffirmed the availability of the declaratory judgment procedure as a means of seeking judicial review of agency action, in the absence or inadequacy of special statutory review proceedings.

Despite this double-barreled statutory authority for use of declaratory judgments in administrative law, the device has not been as successfully employed as many commentators believe would be desirable. In a number of cases, courts have declined to render declaratory relief, for various reasons of judicial discretion, e. g., *Utah Fuel Co. v. National Bituminous Coal Commission* (App. D. C., 1938), 101 F. (2d) 426—plaintiff should have exhausted administrative remedies; *Bradley Lumber Co. of Arkansas v. National Labor Relations Board* (CCA 5th, 1936), 84 F. (2d) 97—failure to exhaust administrative remedies; *Ashwander v. Tennessee Valley Authority*, 297 U. S. 288, 80 L. Ed. 688, 56 S. Ct. 466 (1936)—no "case or controversy"; *Electric Bond & Share Co. v. Securities & Exchange Commission*, 303 U. S. 419, 82 L. Ed. 936, 58 S. Ct. 678 (1938)—no "case or controversy"; *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U. S. 293, 87 L. Ed. 1407, 63 S. Ct. 1070 (1943)—declaratory relief refused because it would have been practically as effective as an injunction, which by statute was unavailable; *Eccles v. Peoples Bank of Lakewood Village, Cal.*, 333 U. S. 426, 92 L. Ed. 784, 68 S. Ct. 641 (1948)—declaration as to validity of rule refused because agency disavowed any present intention of enforcing the rule.

The last cited decision was criticized by the Hoover Commission Task Force on Legal Services and Procedures in its Report (p. 212); and the amendments to the Federal Administrative Procedure Act recommended by the Task Force would go far toward promoting the use of the declaratory judgment device in administrative law situations.

The desirability of such a development has been urged by several writers. See, e. g., Lavery, "The Declaratory Judgment in Administrative Law," 14 Fed. Rules Dec. 479 (1953); Borchard, "Declaratory Judgments in Administrative Law," 11 N. Y. U. L. Q. Rev. 139 (1933).

In a number of cases, courts have rendered declaratory judgments in cases involving the validity of administrative rules or acts, or the jurisdiction of agencies. *Gully v. Interstate Natural Gas Co., Inc.* (CCA 5th, 1936), 82 F. (2d) 145; *Perkins v. Elg*, 307 U. S. 325, 83 L. Ed. 1320, 59 S. Ct. 884 (1939). The subject is fully discussed in Public Service Commission of Utah *v. Wycoff Co.*, 344 U. S. 237, 97 L. Ed. 291, 73 S. Ct. 236 (1952).<sup>2</sup>

## SECTION 2. TIMING OF REQUEST FOR JUDICIAL RELIEF

### Prior Resort to Administrative Agencies Before Seeking Relief in Court

*United States Navigation Co., Inc. v. Cunard Steamship Co., Ltd.*, Supreme Court of the United States, 1932. 284 U. S. 474, 76 L. Ed. 408, 52 S. Ct. 247.

MR. JUSTICE SUTHERLAND delivered the opinion of the court.

The United States Navigation Company is a corporation operating ships in foreign commerce. It brought this suit in the federal district court for the southern district of New York to enjoin respondents from continuing an alleged combination and conspiracy in violation of the Sherman Anti-trust Act, c. 647, 26 Stat. 209, Title 15, USC §§ 1-7, and of the Clayton Act, c. 323, 38 Stat. 730, Title 15, USC §§ 12-27. The District Court granted a motion to dismiss the amended bill on the ground, principally, that the matters complained of were within the exclusive jurisdiction of the United States Shipping Board, under the Shipping Act of 1916, c. 451, 39 Stat. 728, Title 46, USC §§ 801-842, as amended by the Merchant Marine Act of 1920, c. 250, 41 Stat. 988, 39 F. (2d) 204. The Circuit Court of Appeals affirmed. 50 F. (2d) 83.

For present purposes, the substance of the pertinent allegations of the bill may be stated as follows: The petitioner, during the time mentioned in the bill, operated steamships for the carriage of general cargo between the port of New York and specified foreign ports. The respondents are corporations also engaged in foreign commerce between the United States and specified foreign countries, carrying ninety-five per cent of the general cargo trade from North Atlantic ports in the United States to the ports of Great Britain and Ireland. These corporations and the petitioner are the only lines maintaining general cargo services in that trade. Respondents have entered into and are engaged in a

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<sup>2</sup> For a discussion of various phases of the subject, see Davis, "Forms of Proceedings for Judicial Review of Administrative Action," 44 Ill. L. Rev. 565 (1949).

combination and conspiracy to restrain the foreign trade and commerce of the United States in respect of the carriage of general cargo from the United States to the foreign ports named, with the object and purpose of driving the petitioner and all others not parties to the combination out of, and of monopolizing, such trade and commerce. The conspiracy involves the establishment of a general tariff rate and a lower contract rate, the latter to be made available only to shippers who agree to confine their shipments to the lines of respondents. The differentials thus created between the two rates are not predicated upon volume of traffic or frequency or regularity of shipment, but are purely arbitrary and wholly disproportionate to any difference in service rendered, the sole consideration being their effect as a coercive measure. The tariff rate in numerous instances is as much as one hundred per cent higher than the contract rate. The disproportionately wide spread of these differentials is wholly arbitrary and unreasonable. The respondents have put into effect what is called a scheme of joint exclusive patronage contracts, by which shippers are required to agree to ship exclusively by their lines, and to refrain from offering any shipments to petitioner. Unless they so agree, the shippers are forced to pay the far higher general tariff rates. This plan is resorted to for the purpose of coercing shippers to deal exclusively with respondents and refrain from shipping by the vessels of petitioner, and thus exclude it entirely from the carrying trade between the United States and Great Britain.

Other means to accomplish the same end are alleged, such as, giving rebates; spreading false rumors and falsely stating that petitioner is about to discontinue its service; making use of their combined economic bargaining power to coerce various shippers, who are also producers of commodities used in large quantities by respondents, to enter into joint exclusive contracts with them; and threatening to blacklist forwarders and refuse to pay them joint brokerage fees unless they discontinue making, or advising shippers to make, shipments in petitioner's ships. Certain overt acts are alleged as being in furtherance of the combination, conspiracy, and attempt to monopolize. A more detailed analysis of the amended bill, is embodied in the statement of the case which precedes the opinion of the court below.

It may be conceded that looking alone to the Sherman Anti-trust Act the bill states a cause of action under sections 1 and 2 of that act, and, consequently, furnishes ground for an injunction under section 16 of the Clayton Act, unless the Shipping Act stands in the way; and this was the view of both courts below.

The Shipping Act is a comprehensive measure bearing a relation to common carriers by water substantially the same as that borne by the Interstate Commerce Act to interstate common carriers by land. When the Shipping Act was passed, the Interstate Commerce Act had been in force in its original form or in amended forms for more than a

generation. Its provisions had been applied to a great variety of situations, and had been judicially construed in a large number and variety of cases. The rule had become settled, that questions essentially of fact and those involving the exercise of administrative discretion, which were within the jurisdiction of the Interstate Commerce Commission, were primarily within its exclusive jurisdiction, and, with certain exceptions not applicable here, that a remedy must be sought from the commission before the jurisdiction of the courts could be invoked. In this situation the Shipping Act was passed. In its general scope and purpose, as well as in its terms, that act closely parallels the Interstate Commerce Act; and we cannot escape the conclusion that Congress intended that the two acts, each in its own field, should have like interpretation, application and effect. It follows that the settled construction in respect of the earlier act must be applied to the later one, unless, in particular instances, there be something peculiar in the question under consideration, or dissimilarity in the terms of the act relating thereto, requiring a different conclusion.

The decisions of this court which deal with the subject under the Interstate Commerce Act are fully reviewed by the court below in an able and carefully drawn opinion. It is enough for us here to refer to a few illustrative cases. In *Great Northern Ry. v. Merchants Elev. Co.*, 259 U. S. 285, 291, the general rule and an exception to it are considered. The immediate question there at issue concerned merely the legal construction of an interstate tariff, no question of fact, either as an aid to the construction, or in any other respect, and no question of administrative discretion, being involved. It was held that the issue was within the jurisdiction of the courts without preliminary resort to the commission. But the distinction between that case and one where preliminary resort to the commission is necessary was definitely stated. Such resort, it was said, must be had where a rate, rule or practice is attacked as unreasonable or as unjustly discriminatory, and also where it is necessary, in the construction of a tariff, to determine upon evidence the peculiar meaning of words or the existence of incidents alleged to be attached by usage to the transaction. In all such cases the uniformity which it is the purpose of the Commerce Act to secure could not be obtained without a preliminary determination by the commission. Preliminary resort to the commission "is required because the enquiry is essentially one of fact and of discretion in technical matters; and uniformity can be secured only if its determination is left to the Commission. Moreover, that determination is reached ordinarily upon voluminous and conflicting evidence, for the adequate appreciation of which acquaintance with many intricate facts of transportation is indispensable; and such acquaintance is commonly to be found only in a body of experts. But what construction shall be given to a railroad tariff presents ordinarily a question of law

which does not differ in character from those presented when the construction of any other document is in dispute."

In *Board v. Great Northern Ry.*, 281 U. S. 412, an interlocutory injunction had been granted by a Federal District Court of three judges in a suit assailing intrastate railroad rates as working undue and unreasonable discrimination against interstate commerce. The order granting the injunction was reversed on the ground that the district court was without power to entertain the suit in advance of a determination of the question by the Interstate Commerce Commission.

"The inquiry," we said (pp. 421-422), "would necessarily relate to technical and intricate matters of fact, and the solution of the question would demand the exercise of sound administrative discretion. The accomplishment of the purpose of Congress could not be had without the comprehensive study of an expert body continuously employed in administrative supervision. Only through the action of such a body could there be secured the uniformity of ruling upon which appropriate protection from unreasonable exactions and unjust discriminations must depend."

So the rule has been applied where recovery was sought by a shipper for unreasonable and excessive freight rates not found to be unreasonable by the commission, *Texas & Pac. Ry. v. Abilene Cotton Oil Co.*, 204 U. S. 426; where the question was as to the reasonableness of the carrier's practice in distributing cars, *Midland Valley R. R. v. Barkley*, 276 U. S. 482; where the reasonableness of a particular practice of routing was involved, *Northern Pacific Ry. Co. v. Solum*, 247 U. S. 477, 483; where the continuance of service on an industrial track was assailed as unduly discriminatory, *Western & A. R. Co. v. Georgia Pub. Serv. Com.*, 267 U. S. 493, 497; and where an action was brought under section 7 of the Anti-trust Act, based upon an alleged conspiracy among carriers to fix rates, *Keogh v. C. & N. W. Ry. Co.*, 260 U. S. 156. In the case last cited it was pointed out (p. 163) that to permit a shipper to recover under the Anti-trust Act, the amount recovered might, like a rebate, operate to give him a preference over his trade competitors. "Uniform treatment would not result, even if all sued, unless the highly improbable happened, and the several juries and courts gave to each the same measure of relief."

That the Shipping Act covers the dominant facts alleged in the present case as constituting a violation of the Anti-trust Act is clear. Section 14 prohibits retaliation by a common carrier by water against any shipper by resort to discriminating or unfair methods because the shipper has patronized another carrier; and section 14a confers power upon the board to determine the question. The latter section also confers similar power on the board in respect of any combination, agreement or understanding involving transportation of passengers or property between foreign ports, deferred rebates, or any other unfair practice

designated in section 14. Section 16 makes it unlawful for any such carrier, alone or in conjunction with another, to give any undue or unreasonable preference or advantage to any particular person, locality or description of traffic, or to subject any such person, locality or traffic to undue or unreasonable prejudice or disadvantage in any respect, or to allow any person to obtain transportation for property at less than the regular rates by any unjust or unfair device or means. Section 17 prohibits any charge or rate unjustly discriminatory between shippers or ports, etc., and gives the board authority to alter the same to the extent necessary to correct the discrimination or prejudice, and to order the carrier to discontinue. Section 22 authorizes any person to file with the board a complaint, setting forth any violation of the act by a common carrier by water, and asking reparation for the injury. Copy of the complaint is to be furnished to the carrier, who is required to satisfy the complaint or answer it in writing. If not satisfied, the board is authorized to investigate the case and make such order as it deems proper, and the board may direct payment of full reparation for the injury caused by such violation. The board is also authorized, upon its own motion, except as to orders for the payment of money, to investigate any violation of the act. We need not pursue the analysis further. These and other provisions of the Shipping Act clearly exhibit the close parallelism between that act and its prototype, the Interstate Commerce Act, and the applicability to both of like principles of construction and administration.

The act is restrictive in its operation upon some of the activities of common carriers by water, and permissive in respect of others. Their business involves questions of an exceptional character, the solution of which may call for the exercise of a high degree of expert and technical knowledge. Whether a given agreement among such carriers should be held to contravene the act may depend upon a consideration of economic relations, of facts peculiar to the business or its history, of competitive conditions in respect of the shipping of foreign countries, and of other relevant circumstances, generally unfamiliar to a judicial tribunal, but well understood by an administrative body especially trained and experienced in the intricate and technical facts and usages of the shipping trade; and with which that body, consequently, is better able to deal. Compare *Chicago Board of Trade v. United States*, 246 U. S. 231, 238; *United States v. Hamburg-American S. S. Line*, 216 Fed. 971.

A comparison of the enumeration of wrongs charged in the bill with the provisions of the sections of the Shipping Act above outlined conclusively shows, without going into detail, that the allegations either constitute direct and basic charges of violations of these provisions or are so interrelated with such charges as to be in effect a component part of them; and the remedy is that afforded by the Shipping Act,

which to that extent supersedes the anti-trust laws. Compare *Keogh v. C. & N. W. Ry. Co.*, *supra*, at p. 162. The matter, therefore, is within the exclusive preliminary jurisdiction of the Shipping Board. The scope and evident purpose of the Shipping Act, as in the case of the Interstate Commerce Act, are demonstrative of this conclusion. Indeed, if there be a difference, the conclusion as to the first named act rests upon stronger ground, since the decisions of this court compelling a preliminary resort to the commission were made in the face of a clause in section 22 of the Interstate Commerce Act, that nothing therein contained should in any way abridge or alter existing common law or statutory remedies, but that the provisions of the act were in addition to such remedies (*Mitchell Coal Co. v. Pennsylvania R. Co.*, 230 U. S. 247, 256); a clause that finds no counterpart in the Shipping Act. . . .

Decree affirmed.<sup>3</sup>

<sup>3</sup> The *Cunard Steamship* case, and the several cases immediately following it in the casebook deal with the question of the time at which an aggrieved party may seek judicial relief in cases involving administrative agency action.

The leading case on the question in the *Cunard* case, i. e., the necessity of first presenting the case to the agency, is *Texas & P. Ry. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 51 L. Ed. 533, 27 S. Ct. 350 (1907), discussed by Kirchwey in "The Interstate Commerce Commission and the Judicial Enforcement of the Act to Regulate Commerce," 14 *Columbia L. Rev.* 211 (1914).

For another "prior resort" case see *P. F. Petersen Baking Co. v. Bryan*, 290 U. S. 570, 78 L. Ed. 505, 54 S. Ct. 277 (1934), in which the principle of the *Cunard* case is applied to the case of a person aggrieved by a legislative rule of a state administrative agency. The plaintiff, who was seeking to enjoin a regulation of the Secretary of Agriculture of Nebraska, was told that "where one complains that regulations promulgated under legislative authority by a state board are unreasonable and oppressive, he should seek relief by applying to that board to modify them." In the particular case, the court said, "There is no suggestion that if appellants had sought a modification of the . . . (rules) complained of, their application would not have been fairly considered or that they would have been denied the relief to which they were entitled."

For a case in which the doctrine of "prior resort" was argued and urged but rejected, see *United States Alkali Export Ass'n v. United States*, 325 U. S. 196, 89 L. Ed. 1554, 65 S. Ct. 1120 (1945). In that case the court held that the Webb-Pomerene Act did not by implication confer upon the Federal Trade Commission exclusive jurisdiction over the initiation of Sherman Anti-Trust Act cases against export associations. The Webb-Pomerene Act exempts from the prohibitions of the Sherman Act all associations "entered into for the sole purpose of engaging in export trade and actually engaged solely in such export trade" and also "any agreement made or act done in the course of export trade by such associations provided such association, agreement or Act is not in restraint of trade within the United States and is not in restraint of the export trade of any domestic competitor of such association." The act further provides that whenever the Federal Trade Commission shall have reason to believe that an export association is violating the Sherman Act in ways not protected by the provisions of the Webb-Pomerene exemptions, the commission shall conduct an investigation into the alleged violations. If "it is concluded that the law has been violated, it (i. e., the Commission) may make to such



**Myers v. Bethlehem Shipbuilding Corp., Supreme Court of the United States, 1938. 303 U. S. 41, 82 L. Ed. 638, 58 S. Ct. 459.**

MR. JUSTICE BRANDEIS delivered the opinion of the court.

The question for decision is whether a federal District Court has equity jurisdiction to enjoin the National Labor Relations Board from holding a hearing upon a complaint filed by it against an employer alleged to be engaged in unfair labor practices prohibited by National Labor Relations Act, July 5, 1935, c. 372, 49 Stat. 449, 29 USCA § 151 et seq. The Circuit Court of Appeals for the First Circuit held in these cases that the District Court possesses such jurisdiction; and granted preliminary injunctions. Every other Circuit Court of Appeals in which the question has arisen has held the contrary. Because of the importance of the questions presented, the conflict in the lower courts and alleged conflict with our own decisions, we granted these writs of certiorari. (302 U. S. 667, 82 L. Ed. 514, 58 S. Ct. 26, 27.)

The declared purpose of the National Labor Relations Act is to diminish the causes of labor disputes burdening and obstructing interstate and foreign commerce; and its provisions are applicable only to such commerce. In order to protect it, the act seeks to promote collective bargaining; confers upon employees engaged in such commerce the right to form, and join in, labor organizations; defines acts of an employer which shall be deemed unfair labor practice; and confers upon the Board certain limited powers with a view to preventing such practices. If a charge is made to the Board that a person "has engaged in or is engaging in any . . . unfair labor practice," and it appears that a proceeding in respect thereto should be instituted, a complaint stating the charge is to be filed, and a hearing is to be held thereon upon notice to the person complained of.

The Industrial Union of Marine and Shipbuilding Workers of America, Local No. 5, made to the Board a charge that the Bethlehem Ship-

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association recommendations for the readjustment of its business in order that it may thereafter maintain its organization and management and conduct its business in accordance with law." If the association fails to comply with the recommendations of the Commission, it "shall refer its findings and recommendations to the Attorney General of the United States for such action thereon as he may deem proper." The court held that notwithstanding the foregoing powers conferred upon the Federal Trade Commission, the United States Attorney General could initiate a suit against export association for violation of the Sherman Act even though the Federal Trade Commission had not previously investigated and recommended action. In other words, the doctrine of "prior resort" was not deemed applicable.

See also *United States v. Borden Co.*, 308 U. S. 188, 84 L. Ed. 181, 60 S. Ct. 182 (1939), a case corresponding to the Alkali Export Association case but involving the Capper-Volstead Act in regard to collective marketing by members of the Agricultural Cooperative Associations.

For a discussion of the subject see Stason, "Timing of Judicial Redress from Erroneous Administrative Action," 25 Minn. L. Rev. 560 (1941).

building Corporation, Limited, was engaging in unfair labor practices at its plant in Quincy, Mass., for the production, sale, and distribution of boats, ships, and marine equipment. Upon that charge the Board filed on April 13, 1936, a complaint which alleged, among other things, that the company dominates and interferes in the manner described "with a labor organization known as Plan of Representation of Employees in Plants of the Bethlehem Shipbuilding Corporation, Ltd."; that such action leads to strikes interfering with interstate commerce; and that "the aforesaid acts of respondent constitute unfair labor practices affecting commerce, within the meaning of Section 8, subdivisions (1) and (2) and Section 2, subdivisions (6) and (7) of said [National Labor Relations] Act." [29 USCA §§ 158 (1, 2), 152 (6, 7).]

The complaint alleged, specifically:

"The respondent in the course and conduct of its business causes and has continuously caused large quantities of the raw material used in the production of its boats, ships and marine equipment to be purchased and transported in interstate commerce from and through states of the United States other than the State of Massachusetts to the Fore River Plant in the State of Massachusetts, and causes and has continuously caused the boats, ships and marine equipment produced by it to be sold and transported in interstate commerce from the Fore River Plant in the State of Massachusetts to, into and through states of the United States other than the State of Massachusetts, all of the aforesaid constituting a continuous flow of trade, traffic and commerce among the several states."

The Board duly notified the corporation that a hearing on the complaint would be held on April 27, 1936, at Boston, Mass., in accordance with rules and regulations of the Board, a copy of which was annexed to the notice; and that the corporation "will have the right to appear, in person or otherwise, and give testimony."

On that day the corporation filed, in the federal court for Massachusetts, the bill in equity, herein numbered 181, against A. Howard Myers, acting regional director for the First Region, National Labor Relations Board, Edmund J. Blake, its regional attorney for the First Region, and Daniel M. Lyons, trial examiner, to enjoin them from holding "a hearing for the purpose of determining whether or not the plaintiff has engaged at its Fore River Plant in any so-called unfair labor practices under the National Labor Relations Act, and from having any proceedings or taking any action whatsoever, at any time or times with respect thereto." There were prayers for a restraining order, an interlocutory injunction, and a permanent injunction; and also a prayer that the court declare that the National Labor Relations Act and "defendants' actions and proposed actions thereunder" violate the Federal Constitution.

On May 4, 1936, another bill in equity, herein numbered 182, against the same defendants, seeking, on largely the same allegations of fact, substantially the same relief, was brought in the same court by Charles MacKenzie, James E. Manning, and Thomas E. Barker, employees of the Bethlehem Corporation and officers of the so-called Plan of Representation at the Fore River Plant.

Upon the filing of each bill, the District Court issued a restraining order and an order of notice to show cause why a preliminary injunction should not issue. In each case the defendants filed a motion to dismiss the bill of complaint and also a return to the order to show cause. The cases were heard together. In each, the District Court issued the preliminary injunction; and the decrees therefor are still in effect. They were affirmed by the Circuit Court of Appeals for the First Circuit on February 12, 1937. 88 F. 2d 154. Petitions for a rehearing, based upon the conflict with the decisions of other circuit courts of appeals, were denied. And the court denied also motions for leave to file a second petition for rehearing, based upon the decisions of this Court in *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 57 S. Ct. 615, 81 L. Ed. 893, 108 A. L. R. 1352, and other cases rendered April 12, 1937. 1 Cir., 89 F. 2d 1000. The District Court denied the motions to dismiss the bills. *Bethlehem Shipbuilding Corp. v. Meyers*, 15 F. Supp. 915. But the review by the Circuit Court of Appeals dealt only with the decrees for a preliminary injunction.

The two cases present, in the main, the same questions. In discussing them reference will be made, in the first instance, only to the suit brought by the corporation.

We are of opinion that the District Court was without power to enjoin the Board from holding the hearings.

First. There is no claim by the corporation that the statutory provisions and the rules of procedure prescribed for such hearings are illegal; or that the corporation was not accorded ample opportunity to answer the complaint of the Board; or that opportunity to introduce evidence on the allegations made will be denied. The claim is that the provisions of the act are not applicable to the corporation's business at the Fore River Plant, because the operations conducted there are not carried on, and the products manufactured are not sold, in interstate or foreign commerce; that, therefore, the corporation's relations with its employees at the plant cannot burden or interfere with such commerce; that hearings would, at best, be futile; and that the holding of them would result in irreparable damage to the corporation, not only by reason of their direct cost and the loss of time of its officials and employees, but also because the hearings would cause serious impairment of the good will and harmonious relations existing between the corporation and its employees, and thus seriously impair the efficiency of its operations.

Second. The District Court is without jurisdiction to enjoin hearings because the power "to prevent any person from engaging in any unfair practice affecting commerce" has been vested by Congress in the Board and the Circuit Court of Appeals, and Congress has declared: "This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise." The grant of that exclusive power is constitutional, because the act provided for appropriate procedure before the Board and in the review by the Circuit Court of Appeals an adequate opportunity to secure judicial protection against possible illegal action on the part of the Board. No power to enforce an order is conferred upon the Board. To secure enforcement, the Board must apply to a Circuit Court of Appeals for its affirmance. And, until the Board's order has been affirmed by the appropriate Circuit Court of Appeals, no penalty accrues for disobeying it. The independent right to apply to a Circuit Court of Appeals to have an order set aside is conferred upon any party aggrieved by the proceeding before the Board. The Board is even without power to enforce obedience to its subpoena to testify or to produce written evidence. To enforce obedience it must apply to a District Court; and to such an application appropriate defense may be made.

As was said in *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 46, 47, 57 S. Ct. 615, 628, 81 L. Ed. 893, 108 A. L. R. 1352, the procedural provisions "do not offend against the constitutional requirements governing the creation and action of administrative bodies. See *Interstate Commerce Commission v. Louisville & Nashville R. Co.*, 227 U. S. 88, 91, 33 S. Ct. 185, 57 L. Ed. 431. The act establishes standards to which the Board must conform. There must be complaint, notice and hearing. The Board must receive evidence and make findings. The findings as to the facts are to be conclusive, but only if supported by evidence. The order of the Board is subject to review by the designated court, and only when sustained by the court may the order be enforced. Upon that review all questions of the jurisdiction of the Board and the regularity of its proceedings, all questions of constitutional right or statutory authority are open to examination by the court. We construe the procedural provisions as affording adequate opportunity to secure judicial protection against arbitrary action in accordance with the well-settled rules applicable to administrative agencies set up by Congress to aid in the enforcement of valid legislation."

It is true that the Board has jurisdiction only if the complaint concerns interstate or foreign commerce. Unless the Board finds that it does, the complaint must be dismissed. And, if it finds that interstate or foreign commerce is involved, but the Circuit Court of Appeals concludes that such finding was without adequate evidence to support it, or

otherwise contrary to law, the Board's petition to enforce it will be dismissed, or the employer's petition to have it set aside will be granted. Since the procedure before the Board is appropriate and the judicial review so provided is adequate, Congress had power to vest exclusive jurisdiction in the Board and the Circuit Court of Appeals. *Anniston Manufacturing Co. v. Davis*, 301 U. S. 337, 343-346, 57 S. Ct. 816, 819, 820, 81 L. Ed. 1143.

Third. The corporation contends that, since it denies that interstate or foreign commerce is involved and claims that a hearing would subject it to irreparable damage, rights guaranteed by the Federal Constitution will be denied unless it be held that the District Court has jurisdiction to enjoin the holding of a hearing by the Board. So to hold would, as the government insists, in effect substitute the District Court for the Board as the tribunal to hear and determine what Congress declared the Board exclusively should hear and determine in the first instance. The contention is at war with the long-settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted. That rule has been repeatedly acted on in cases where, as here, the contention is made that the administrative body lacked power over the subject matter.

Obviously, the rule requiring exhaustion of the administrative remedy cannot be circumvented by asserting that the charge on which the complaint rests is groundless and that the mere holding of the prescribed administrative hearing would result in irreparable damage. Lawsuits also often prove to have been groundless; but no way has been discovered of relieving a defendant from the necessity of a trial to establish the fact. . . .

Decrees for preliminary injunction reversed, with direction to dismiss the bills.

### Current Status of Prior Resort Doctrine

The "prior resort" or, as it is often called, the "primary jurisdiction" doctrine—the rule that if an agency has jurisdiction to act in respect to a matter, the matter must be presented initially to the agency—has been applied in many cases, such as the *Myers* case, where the reasons originally announced for the rule [to take full advantage of administrative expertness, and to attain uniformity of application of regulatory laws] seem scarcely to apply.

Should the doctrine requiring prior resort to the agency be applied where the only question involved is one of law? Compare, in this respect, the holding in the *Myers* case and the decision in *Great Northern Ry. Co. v. Merchants Elevator Co.*, 255 U. S. 285, 66 L. Ed. 943, 42 S. Ct. 477 (1922).

Should the doctrine be applied where the administrative agency can give only a part of the relief which plaintiff seeks? Suppose, for example, plaintiff asserts he is entitled to both a cease and desist order (which the agency can grant) and to an award of damages (a claim which the agency cannot entertain). In *S. S. W., Inc. v. Air Transport Ass'n* (App. D. C., 1951), 191 F. (2d) 658, plaintiff brought suit under the anti-trust laws, seeking injunctive relief and treble damages. The court held that he must initially resort to the Civil Aeronautics Board so far as concerned his plea for injunctive relief; and that the district court should retain jurisdiction of the damage claim, awaiting the outcome of the proceedings before the Civil Aeronautics Board, so that the court would have the benefit of its administrative decision in deciding whether to award damages. Is this a satisfactory solution of the problem? In *Texas State Federation of Labor v. Brown & Root, Inc.* (Tex. Civ. App., 1952), 246 S. W. (2d) 938, where an employer sued a union, praying both injunctive relief (which might in effect be obtained by resort to the N. L. R. B.) and also damages, the court rejected the contention that the claim for injunctive relief must be initially presented to the N. L. R. B., holding that prior resort should be required only where the agency can give full and adequate relief. Which view is preferable?

Suppose plaintiff attacks the validity of an administrative regulation, adopted by an agency in the exercise of its rule-making power. Must he first ask the agency to pass on the reasonableness and validity of the rule? See *Ambassador, Inc. v. United States*, 325 U. S. 317, 89 L. Ed. 1637, 65 S. Ct. 1151 (1945). Cf. *Lichten v. Eastern Airlines* (CA 2nd, 1951), 189 F. (2d) 939, where the attack was directed to the legality of a tariff rule, filed by a carrier with the Civil Aeronautics Board.

Should prior resort be required where plaintiff attacks the jurisdiction of the agency? See *Ward v. Keenan*, 3 N. J. 298, 70 A. (2d) 77 (1949).

Suppose it is claimed that the statute creating the agency is unconstitutional. Should prior resort still be required? In *Diggs v. State Board of Embalmers and Funeral Directors*, 321 Mich. 508, 32 N. W. (2d) 728 (1948), the court observed: "It is scarcely logical to say that plaintiff is bound to press a remedy ostensibly granted by the statute the validity of which he assails." Cf. *Smith v. Duldner* (CA 6th, 1949), 175 F. (2d) 629; and *Monolith Portland Midwest Co. v. Reconstruction Finance Corp.* (CA 9th, 1949) 178 F. (2d) 854, where the court said: ". . . the judicial determination even of constitutional issues ordinarily must await the exhaustion of prescribed administrative remedies."

The question whether the doctrine of primary jurisdiction has been pressed too far is one which has recently received considerable attention. In Jaffe "Primary Jurisdiction Reconsidered. The Anti-Trust Laws," 102 U. of Pa. L. Rev. 577, 604 (1954), it is suggested: "The doctrine of primary jurisdiction is a valid one so far as necessary to avoid contradiction, confusion, and wastefulness. Beyond that, its use should be

sparing." For other discussion see Schwartz, "Administrative Law; 1942-1951," 51 Mich. L. Rev. 775 (1953).

### Exhaustion of Administrative Remedies

**Aircraft & Diesel Equipment Corp. v. Hirsch**, Supreme Court of the United States, 1947. 331 U. S. 752, 91 L. Ed. 1796, 67 S. Ct. 1493.

While proceedings were pending in the Tax Court for redetermination of excessive profits determined by the Secretary of War and the War Contracts Price Adjustment Board to have been realized by a subcontractor on production of war equipment, the subcontractor sued in a Federal District Court for a declaratory judgment that the Renegotiation Acts are unconstitutional and for an injunction against further proceedings thereunder. The District Court dismissed the suit.

MR. JUSTICE RUTLEDGE delivered the opinion of the court.

The amended complaint is too lengthy for detailed summarization in this opinion. Apart from allegations going to constitutionality and coverage, including asserted defects in the renegotiation procedures followed, the complaint sought to establish jurisdiction in the District Court, equitable in character, by showing the inadequacy of all available legal or other remedies. These included the pending Tax Court proceedings, possible suit in the Court of Claims following completion of the Tax Court's determination, and actions at law against appellant's customers, contractors with the Government, to recover the amounts said to be due under their various contracts.

In particular it was alleged that, notwithstanding the pendency of the Tax Court proceedings, the Board and the Secretary, or his delegates, were taking steps to prevent Aircraft's customers from paying over to it moneys owing on contracts, aggregating \$270,000, and claimed to be due the Government as excessive profits. The complaint alleged further that the Board and the Secretary were threatening to direct Aircraft's customers to pay these sums into the Treasury and that, unless they were restrained, such payment would be made, to appellant's irreparable injury. . . .

. . . The doctrine, wherever applicable, does not require merely the initiation of prescribed administrative procedures. It is one of exhausting them, that is, of pursuing them to their appropriate conclusion and, correlatively, of awaiting their final outcome before seeking judicial intervention.

The very purpose of providing either an exclusive or an initial and preliminary administrative determination is to secure the administrative judgment either, in the one case, in substitution for judicial decision or, in the other, as foundation for or perchance to make unnecessary later judicial proceedings. Where Congress has clearly commanded that administrative judgment be taken initially or exclusively, the courts

have no lawful function to anticipate the administrative decision with their own, whether or not when it has been rendered they may intervene either in presumed accordance with Congress' will or because, for constitutional reasons, its will to exclude them has been exerted in an invalid manner. To do this not only would contravene the will of Congress as a matter of restricting or deferring judicial action. It would nullify the congressional objects in providing the administrative determination. In this case these include securing uniformity of administrative policy and disposition, expertness of judgment, and finality in determination, at least of those things which Congress intended to and could commit to such agencies for final decision.

. . . .

We are not forced in this case, however, to decide whether Congress intended to give the Tax Court the last word upon all questions of fact and law, or whether it could do so if that were surely its purpose. Nor need we become involved in an attempt to decide what particular questions it might have left, or did leave, for that body's final and conclusive disposition. For it seems obvious, in view of the Act's terms, history, objects and the policies incorporated, that Congress clearly and at the very least intended the Tax Court's functions not only to be put in motion but to be fully performed, before judicial intervention should take place at the instance of one in appellant's position.

. . . .

It is true that the presence of constitutional questions, coupled with a sufficient showing of inadequacy of prescribed administrative relief and of threatened or impending irreparable injury flowing from delay incident to following the prescribed procedure, has been held sufficient to dispense with exhausting the administrative process before instituting judicial intervention. But, without going into a detailed analysis of the decisions, this rule is not one of mere convenience or ready application. Where the intent of Congress is clear to require administrative determination, either to the exclusion of judicial action or in advance of it, a strong showing is required, both of inadequacy of the prescribed procedure and of impending harm, to permit short-circuiting the administrative process. Congress' commands for judicial restraint in this respect are not lightly to be disregarded.

. . . [affirmed.]

### Estoppel

**First National Bank of Greeley v. Board of Commissioners of Weld County, Supreme Court of the United States, 1924. 264 U. S. 450, 68 L. Ed. 784, 44 S. Ct. 385.**

MR. JUSTICE SUTHERLAND delivered the opinion of the court.

This is an action to recover the amount of certain taxes levied for the fiscal years 1913 and 1914 and paid under protest. The court below sus-



tained a demurrer to the amended complaint, and, plaintiff electing to stand thereon, entered judgment of dismissal.

Reversal of the judgment is sought here on the ground that the taxes were assessed and collected in contravention of the due process and equal protection clauses of the Fourteenth Amendment and of par. 5219, U. S. Rev. Stats.

Under the Colorado statute, R. S. Colo. 1908, c. 122, a bank is required to make a list of its shares, stating their market value, and of its shareholders for the information of the county assessor, who is thereupon directed to assess such shares for taxation in all respects the same as similar property belonging to other corporations and individuals. Pars. 5754, 5756. If any taxpayer is of the opinion that his property has been assessed too high, or otherwise illegally assessed, he may appear before the assessor and have the same corrected. Par. 5639. The County Commissioners of each county are constituted a Board of Equalization, with power to adjust and equalize the assessment among the several taxpayers; with reference to which any dissatisfied taxpayer may be heard. Par. 5761.

The State Tax Commission, created in 1911, is authorized to supervise the administration of and enforce the tax laws, and exercise supervision over county assessors and boards of equalization, to the end that all assessments be made relatively just and uniform at their true and full cash value. Comp. L. Colo. 1921, c. 155, § 7334, par. 1. The Commission may raise or lower the assessed value of any property, first giving notice to the owner thereof and fixing a time and place for hearing. Id. par. 7. Authority is conferred upon the Commission to receive complaints and examine into all cases where it is alleged that property has been fraudulently, or improperly or unfairly assessed. § 7336. It shall, on or before the first day of October of each year, increase or decrease the valuation of the property in any county by such rate per cent, or such amount as will place the same on the assessment roll at its full and true cash value, § 7352; and must thereupon transmit to the State Board of Equalization a statement of the amount to be added or deducted. § 7353. It then becomes the duty of the State Board of Equalization to examine the abstracts of assessment submitted by the Commission, and certify to the county assessor of each county a record of its action thereon. § 7354. The Commission is required to be in session every day except Sundays, and may hold sessions anywhere in the State. § 7330.

The essential averments of the complaint may be shortly stated: Plaintiff made and delivered to the County Assessor of Weld County the statement required by law. The Assessor thereupon fixed the value of its shares, as well as that of the shares of other banks within the county, at their full cash and market value; but fixed the assessed value of the property of the remaining taxpayers in the county at 61%, for

1913, 80%, for 1914, of such cash and market value. The County Board of Equalization accepted this assessment without change. The Assessor thereupon transmitted to the Tax Commission the abstracts required by law. The Tax Commission determined that the property of the county as a whole had been underassessed, and recommended a horizontal increase of 63% in 1913 and 25% in 1914, as necessary to bring it to the full cash value. This determination was approved by the State Board of Equalization and the County Assessor was directed to make the increase, with the result, as alleged, that plaintiff's assets, and those of all other banks in the county, were in fact assessed at an amount 63% in excess of their value for the year 1913 and 25% in excess thereof for the year 1914. In other counties of the State, either no increase of valuation was made or the increase was comparatively small. The result was that the banks of Weld county were assessed and compelled to pay upon a valuation grossly in excess of that put upon other property in the same county and likewise in excess of that put upon other banks in other counties of the State. It does not appear from the complaint that plaintiff applied to any of the taxing authorities to reduce the assessment of its property or correct the alleged inequalities, prior to the final levy of the tax; but sometime after such levy had been completed, it made application for abatement and rebate, which application was approved by the County Board but disallowed by the State Tax Commission.

We are met at the threshold of our consideration of the case with the contention that the plaintiff did not exhaust its remedies before the administrative boards and consequently cannot be heard by a judicial tribunal to assert the invalidity of the tax. We are of opinion that this contention must be upheld.

The Supreme Court of Colorado, in a suit brought by this plaintiff against the County Assessor, involving the same tax for 1913, and presenting the same questions here involved, sustained the refusal of a lower court to enjoin the collection of the tax, and held: (a) That the flat increase made by the Tax Commission was in strict conformity with the state statutes; (b) That this action being approved by the State Board of Equalization constituted a final assessment; (c) That under the statute the plaintiff was bound to know the authority of these taxing agencies in the premises and that they were required to meet at certain places, on certain days, and complete their labors within designated dates; and (d) "With full knowledge of the respective powers of these several boards to make corrections in assessments and adjustments in equalization, essential to bring about a complete and equitable assessment of all property within the state, it remained inactive until long after the tax was laid, when it applied for an abatement or rebate of the tax. The aforesaid tribunals were open to plaintiff in error prior to the laying of the tax, but it refrained from seeking relief therein, and

may not now complain." *First National Bank v. Patterson*, 65 Colo. 166, 172-173.

The effect of this is to hold that an administrative remedy was in fact open to plaintiff under the statutes of the State, and by this construction, upon well settled principles, we are bound. *McGregor v. Hogan*, 263 U. S. 234; *Farncomb v. Denver*, 252 U. S. 7, 10; *Londoner v. Denver*, 210 U. S. 373, 374; *Price v. Illinois*, 238 U. S. 446, 451; *Western Union Tel. Co. v. Gottlieb*, 190 U. S. 412, 425.

Plaintiff seeks to excuse its failure to apply to the County Board for an equalization by saying that this was a public duty of the Board and not a private remedy; and *Greene v. Louisville & I. R. R. Co.*, 244 U. S. 499, 521, is relied upon as authority. The most cursory examination of that case, however, will disclose its inapplicability. There the divergent assessments were made by two assessing boards, neither having control or supervision of the other; and it was held that complainants, whose property had been assessed by one of these boards, were not entitled, under the Kentucky statutes, to complain to the other board that its assessments were too low. A very different question is presented here, where the same board has affirmed both assessments, is expressly vested by statute with the power of equalization and may exert its power at the instance of anyone aggrieved. *Hallett v. County Commissioners*, 27 Colo. 86, 93; *Barnett v. Jaynes*, 26 Colo. 279, 282.

It is urged further that it would have been futile to seek a hearing before the State Tax Commission because, first, no appeal to a judicial tribunal was provided in the event of a rejection of a taxpayer's complaint; and, second, because the time at the disposal of the Commission for hearing individual complaints was inadequate. But, aside from the fact that such an appeal is not a matter of right, but wholly dependent upon statute, 2 *Cooley on Taxation*, 3d Ed., p. 1393, we cannot assume that if application had been made to the Commission proper relief would not have been accorded by that body, in view of its statutory authority to receive complaints and examine into all cases where it is alleged that property has been fraudulently, improperly or unfairly assessed. *Collins v. City of Keokuk*, 118 Iowa 30, 35. Nor will plaintiff be heard to say that there was not adequate time for a hearing, in the absence of any effort on its part to obtain one. In any event the decision of the State Supreme Court in the *Patterson* case, that such remedies were, in fact, available, is controlling here.

It is contended, however, that the decision in that case turns upon the point that plaintiff had an adequate remedy at law, and not that it had lost its right by neglecting to seek an administrative remedy. It is true the court, after the statement quoted above, proceeds to say that plaintiff cannot have relief in equity, but this seems to be put forth as an independent ground for affirming the judgment below. It follows the unqualified statement that plaintiff, having refrained from seeking

the administrative relief open to it, "may not now complain"; and is introduced by the words (p. 174): "But apart from this, if the tax was not legally laid, plaintiff in error could, upon payment thereof, recover the same from the county under the provisions of § 5750, R. S. 1908." It is not suggested that in so doing the requirement, already broadly recognized, that administrative remedies must be exhausted as a necessary prerequisite to a judicial challenge of the tax, could be dispensed with. And, accepting the decision of the state court that such remedies were, in fact, open and available under the Colorado statutes, it could not be dispensed with. *McGregor v. Hogan*, *supra*; *Farncomb v. Denver*, *supra*, p. 11; *Stanley v. Supervisors of Albany*, 121 U. S. 535; *Petoskey Gas Co. v. Petoskey*, 162 Mich. 447, 452; *Township of Caledonia v. Rose*, 94 Mich. 216, 218; *Hinds v. Township of Belvidere*, 107 Mich. 664, 667; *Ward v. Alsup*, 100 Tenn. 619, 746.

Plaintiff not having availed itself of the administrative remedies afforded by the statutes, as construed by the state court, it results that the question whether the tax is vulnerable to the challenge in respect of its validity upon any or all of the grounds set forth, is one which we are not called upon to consider. The judgment of the District Court is accordingly affirmed.<sup>4</sup>

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<sup>4</sup> The principle of the *Weld County* case, i. e., estoppel for failure to pursue administrative appeals, is strongly supported in *Yakus v. United States*, 321 U. S. 414, 88 L. Ed. 834, 64 S. Ct. 660 (1944). The case involved the Emergency Price Control Act of 1942. Yakus was convicted in the Federal District Court on indictments charging violation of the Act by willful sale of meat at prices above those prescribed by regulations issued under the Act. He had not availed himself of the procedure set up by the Act pursuant to which any person subject to a maximum price regulation might test its validity by filing a protest within sixty days and asking a hearing before the administrator, whose determination was reviewable by the Emergency Court of Appeals and thereafter by the United States Supreme Court on certiorari. When the indictments were found, the sixty-day period allowed by the statute for filing a protest had expired. By way of defense the defendant contended that the Emergency Price Control Act involved an unconstitutional delegation to the Price Administrator of the legislative power of Congress, that the regulation, the violation of which was charged, did not conform to the standards prescribed by the Act, and that it deprived the defendant of property without due process of law.

The Price Control Act prescribed that "the Emergency Court of Appeals and the Supreme Court upon review of judgments and orders of the Emergency Court of Appeals shall have exclusive jurisdiction to determine the validity of any regulation or order issued under Section 2, of any price schedule, . . ." and "Except as provided in this section no court, Federal, State or Territorial shall have jurisdiction or power to consider the validity of any such regulation, order, or price schedule."

The United States Supreme Court held that Yakus' defense was ineffective, that the quoted provisions conferred exclusive jurisdiction upon the Emergency Court of Appeals, and gave clear indication that the validity of the Administrator's orders should not be subject to attack in criminal proceedings brought against those who violate the orders unless such orders have been first adjudi-

## Utilization of State Court Remedies

**Need of Exhaustion of State Administrative Remedies Before Seeking Relief in Federal Courts.**

**Prentis v. Atlantic Coast Line Co., Supreme Court of the United States, 1908. 211 U. S. 210, 53 L. Ed. 150, 29 S. Ct. 67.**

[Appeals from decrees of the Circuit Court of the United States for the Eastern District of Virginia. The facts are stated in the opinion.]

MR. JUSTICE HOLMES delivered the opinion of the court.

These are bills in equity brought in the circuit court to enjoin the members and clerk of the Virginia State Corporation Commission from publishing or taking any other steps to enforce a certain order fixing passenger rates. The bills allege, with some elaboration of the facts, that the rates in question are confiscatory, and other matters not necessary to mention, and set up the 14th Amendment, etc. The defendants appeared specially, and by demurrer and plea respectively put forward that the proceedings before the commission are proceedings in a court of the state, which the courts of the United States are forbidden to enjoin, Rev. Stat. § 720,<sup>5</sup> and that the decision of the commission makes

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cated by recourse to the protest and review procedure prescribed by the statute. This conclusion was reached notwithstanding the fact that the review procedure specified by the Act was restricted by the short sixty-day period of limitation on the filing of protests, and the further fact that the right to a hearing before the administrator consisted only of submitting written evidence and argument. No right of cross-examination was provided and the procedure was so summary that Justice Rutledge, in a dissenting opinion, declared that it was "trimmed almost to the bone of due process." That the decision is an extraordinary and even a questionable one is evidenced by the fact that three Justices dissented with considerable vigor. For a discussion of this phase of the Yakus case, see Quill, "Judicial Review and the Price Control Act," 24 B. U. L. Rev. 250 (1944).

Estoppel to seek judicial redress on account of failure to pursue administrative remedies has developed into a doctrine of importance only during the last two decades. Its effect is to insulate against collateral attack a large group of administrative orders which would otherwise be deemed void and of no effect. Several questions call for answer. Is the doctrine applicable to all types of orders of administrative tribunals, or is it limited to special cases? Is it applicable to all of the issues decided by the tribunals to which it applies, or only to certain classes of issues? Is it applicable in cases of failure to pursue a "legislative" type of statutory appeal to the courts? Is it applicable in cases of failure to pursue a "judicial" type of statutory appeal to the courts? See Stason, "Judicial Review of Tax Errors; Effect of Failure to Resort to Administrative Remedies," 28 Mich. L. Rev. 637 (1930); also "Necessity of Exhausting Administrative Remedies Before Resorting to Judicial Relief," 27 Columbia L. Rev. 450 (1927); "Administrative Action as a Prerequisite of Judicial Relief," 35 Columbia L. Rev. 230 (1935); "Judicial Delimitation of Inferior Federal Equity Jurisdiction in State Tax and Rate Matters," 21 Iowa L. Rev. 768 (1936).

<sup>5</sup> "Rev. Stat. § 720," is the same as section 265 of the Judicial Code, and provides as follows: "The writ of injunction shall not be granted by any court

the legality of the rates *res judicata*. On these pleadings final decrees were entered for the plaintiffs, and the defendants appealed to this court. Therefore, as the case is presented, it is to be assumed that the order confiscates the plaintiffs' property and infringes the 14th Amendment if the matter is open to inquiry. The question principally argued, and the main question to be discussed, is whether the order is one which, in spite of its constitutional invalidity, the courts of the United States are not at liberty to impugn.

The State Corporation Commission is established and its powers are defined at length by the Constitution of the state. There is no need to rehearse the provisions that give it dignity and importance or that add judicial to its other functions, because we shall assume that, for some purposes, it is a court within the meaning of Rev. Stat. § 720, and in the commonly accepted sense of that word. Among its duties it exercises the authority of the state to supervise, regulate, and control public service corporations, and to that end, as is said by the supreme court of Virginia and repeated by counsel at the bar, it has been clothed with legislative, judicial, and executive powers. *Norfolk & P. Belt Line R. Co. v. Comm.*, 103 Va. 289, 294.

The state Constitution provides that the commission, in the performance of the duty just mentioned, shall, from time to time, prescribe and enforce such rates, charges, classification of traffic, and rules and regulations for transportation and transmission companies doing business in the state, and shall require them to establish and maintain all such public service facilities and conveniences as may be reasonable and just. Before prescribing or fixing any rate or charge, etc., it is to give notice (in case of a general order not directed against any specific company by name, by four weeks' publication in a newspaper) of the substance of the contemplated action and of a time and place when the commis-

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of the United States to stay proceedings in any court of a state, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

In *Hill v. Martin*, 296 U. S. 393, 80 L. Ed. 293, 56 S. Ct. 278 (1935), the court had occasion to consider this section, and said concerning it:

"The prohibition of section 265 is against a stay of 'proceedings in any court of a state.' That term is comprehensive. It includes all steps taken or which may be taken in the state court or by its officers from the institution to the close of the final process. It applies to appellate as well as to original proceedings; and is independent of the doctrine of *res judicata*. It applies alike to action by the court and by its ministerial officers; applies not only to an execution issued on a judgment, but to any proceeding supplemental or ancillary taken with a view to making the suit or judgment effective. The prohibition is applicable whether such supplementary or ancillary proceeding is taken in the court which rendered the judgment or in some other. And it governs a privy to the state court proceeding . . . as well as the parties of record. Thus, the prohibition applies whatever the nature of the proceeding, unless the case presents facts which bring it within one of the recognized exceptions to section 265."

sion will hear objections and evidence against it. If an order is passed, the order again is to be published as above before it shall go into effect. An appeal to the supreme court of appeals is given of right to any party aggrieved, upon conditions not necessary to be stated, and that court, if it reverses what has been done, is to substitute such order as, in its opinion, the commission should have made. The commission is to certify the facts upon which its action was based and such evidence as may be required, but no new evidence is to be received, and how far the findings of the commission can be revised perhaps is not quite plain. No other court of the state can review, reverse, correct, or annul the action of the commission, and, in collateral proceedings, the validity of the rates established by it cannot be called in doubt.

When a rate has been fixed, the commission has power to enforce compliance with its order by adjudging and enforcing, by its own appropriate process, against the offending company, the fines and penalties established by law. But a hearing is required, and the validity and reasonableness of the order may be attacked again in this proceeding, and all defenses seem to be open to the party charged with a breach.

On July 31, 1906, under the provisions outlined, the commission published in a newspaper notice to the several steam railroad companies doing business in Virginia, and all persons interested, that, at a certain time and place, it would hear objections to an order prescribing a maximum rate of 2 cents a mile for the transportation of passengers, with details not needing to be stated. A hearing was had, and the complainants (appellees) severally appeared and urged objections similar to those set up in the bills. On April 27, 1907, the commission passed an order prescribing the rates but in more specific form. For certain railroads named, including all of the complainants except as we shall state, the rate was to be 2 cents; for certain excepted branches of the Southern Railway Company,  $2\frac{1}{2}$ ; for others, including the Chesapeake Western Railway, 3; and for others  $3\frac{1}{2}$  cents a mile, with a minimum charge of 10 cents. Publication of the order was directed, and at that stage these bills were brought.

In order to decide the cases it is not necessary to discuss all the questions that were raised or touched upon in argument, and some we shall lay on one side. We shall assume that when, as here, a state Constitution sees fit to unite legislative and judicial powers in a single hand, there is nothing to hinder, so far as the Constitution of the United States is concerned. *Dreyer v. Illinois*, 187 U. S. 71, 83; *Winchester & S. R. Co. v. Com.*, 106 Va. 264. We shall assume, as we have said, that some of the powers of the commission are judicial, and we shall assume, without deciding, that, if it was proceeding against the appellees to enforce this order and to punish them for a breach, it then would be sitting as a court and would be protected from interference on the part of courts of the United States.

But we think it equally plain that the proceedings drawn in question here are legislative in their nature, and none the less so that they have taken place with a body which, at another moment, or in its principal or dominant aspect, is a court such as is meant by § 720. A judicial inquiry investigates, declares, and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation, on the other hand, looks to the future and changes existing conditions by making a new rule, to be applied thereafter to all or some part of those subject to its power. The establishment of a rate is the making of a rule for the future, and therefore is an act legislative, not judicial, in kind, as seems to be fully recognized by the supreme court of appeals (*Com. v. Atlantic Coast Line R. Co.*, 106 Va. 61), and especially by its learned president in his pointed remarks in *Winchester & S. R. Co. v. Com.*, 106 Va. 264. . . .

Proceedings legislative in nature are not proceedings in a court, within the meaning of Rev. Stat. § 720, no matter what may be the general or dominant character of the body in which they may take place. *Southern R. Co. v. Greensboro Ice & Coal Co.*, 134 Fed. 82, 94, affirmed *sub nom. McNeill v. Southern Ry. Co.*, 202 U. S. 543. That question depends not upon the character of the body, but upon the character of the proceedings. *Ex parte Virginia*, 100 U. S. 339. They are not a suit in which a writ of error would lie under Rev. Stat. § 709, and Act of February 18, 1875, chap. 80, 18 Stat. at L. 318. See *Upshur County v. Rich*, 135 U. S. 467; *Wallace v. Adams*, 204 U. S. 415. The decision upon them cannot be *res judicata* when a suit is brought. See *Reagan v. Farmers' Loan & T. Co.*, 154 U. S. 362. And it does not matter what inquiries may have been made as a preliminary to the legislative act. Most legislation is preceded by hearings and investigations. But the effect of the inquiry, and of the decision upon it, is determined by the nature of the act to which the inquiry and decision lead up. A judge sitting with a jury is not competent to decide issues of fact; but matters of fact that are merely premises to a rule of law he may decide. He may find out for himself, in whatever way seems best, whether a supposed statute ever really was passed. In *Pickering v. Barkley*, Style, 132, merchants were asked by the court to state their understanding as an aid to the decision of a demurrer. The nature of the final act determines the nature of the previous inquiry. As the judge is bound to declare the law, he must know or discover the facts that establish the law. So, when the final act is legislative the decision which induces it cannot be judicial in the practical sense, although the questions considered might be the same that would arise in the trial of a case. If a state Constitution should provide for a hearing before any law should be passed, and should declare that it should be a judicial proceeding in rem and the decision binding upon all the world, it hardly is to be supposed that the simple device could make the con-



stitutionality of the law *res judicata*, if it subsequently should be drawn in question before a court of the United States. And all that we have said would be equally true if an appeal had been taken to the supreme court of appeals and it had confirmed the rate. Its action in doing so would not have been judicial, although the questions debated by it might have been the same that might come before it as a court, and would have been discussed and passed upon by it in the same way that it would deal with them if they arose afterwards in a case properly so called. We gather that these are the views of the supreme court of appeals itself. *Atlantic Coast Line R. Co. v. Com.*, 102 Va. 599. They are implied in many cases in this and other United States courts in which the enforcement of rates has been enjoined, notwithstanding notice and hearing, and what counsel in this case call "litigation" in advance. Legislation cannot bolster itself up in that way. Litigation cannot arise until the moment of legislation is past. See *Southern R. Co. v. Comm.*, 107 Va. 771.

It appears to us that the most plausible objection to these bills is not the one most dwelt upon in argument, but that they were brought too soon. Our doubt is a narrow one and its limits should be understood. It seems to us clear that the appellees were not bound to wait for proceedings brought to enforce the rate and to punish them for departing from it. Those, we have assumed in favor of the appellants would be proceedings in court, and could not be enjoined; while to confine the railroads to them for the assertion of their rights would be to deprive them of a part of those rights. If the railroads were required to take no active steps until they could bring a writ of error from this court to the Supreme Court of Appeals after a final judgment, they would come here with the facts already found against them. But the determination as to their rights turns almost wholly upon the facts to be found. Whether their property was taken unconstitutionally depends upon the valuation of the property, the income to be derived from the proposed rate, and the proportion between the two,—pure matters of fact. When those are settled the law is tolerably plain. All their constitutional rights, we repeat, depend upon what the facts are found to be. They are not to be forbidden to try those facts before a court of their own choosing, if otherwise competent. "A state cannot tie up a citizen of another state, having property within its territory invaded by unauthorized acts of its own officers, to suits for redress in its own courts." *Reagan v. Farmers' Loan & T. Co.*, 154 U. S. 362. . . .

Our hesitation has been on the narrower question whether the railroads, before they resorted to the circuit court, should not have taken the appeal allowed to them by the Virginia Constitution at the legislative stage so as to make it absolutely certain that the officials of the state would try to establish and enforce an unconstitutional rule. Considerations of comity and convenience have led this court ordinarily

to decline to interfere by habeas corpus where the petitioner had open to him a writ of error to a higher court of a state, in cases where there was no merely logical reason for refusing the writ. The question is whether somewhat similar considerations ought not to have some weight here.

We admit at once that they have not the same weight in this case. The question to be decided, we repeat, is legislative, whether a certain rule shall be made. Although the appeal is given as a right, it is not a remedy, properly so called. At that time no case exists. We should hesitate to say, as a general rule, that a right to resort to the courts could be made always to depend upon keeping a previous watch upon the bodies that make laws, and using every effort and all the machinery available to prevent unconstitutional laws from being passed. It might be said that a citizen has a right to assume that the Constitution will be respected, and that the very meaning of our system in giving the last word upon constitutional questions to the courts is that he may rest upon that assumption, and is not bound to be continually on the alert against covert or open attacks upon his rights in bodies that cannot finally take them away. It is a novel ground for denying a man a resort to the courts that he has not used due diligence to prevent a law from being passed.

But this case hardly can be disposed of on purely general principles. The question that we are considering may be termed a question of equitable fitness or propriety, and must be answered on the particular facts. The establishment of railroad rates is not like a law that affects private persons, who may never have heard of it till it was passed. It is a matter of great interest, both to the railroads and to the public, and is watched by both with scrutinizing care. The railroads went into evidence before the commission. They very well might have taken the matter before the supreme court of appeals. No new evidence and no great additional expense would have been involved.

The state of Virginia has endeavored to impose the highest safeguards possible upon the exercise of the great power given to the State Corporation Commission, not only by the character of the members of that commission, but by making its decisions dependent upon the assent of the same historic body that is intrusted with the preservation of the most valued constitutional rights, if the railroads see fit to appeal. It seems to us only a just recognition of the solicitude with which their rights have been guarded, that they should make sure that the state, in its final legislative action, would not respect what they think their rights to be, before resorting to the courts of the United States.

If the rate should be affirmed by the supreme court of appeals and the railroads still should regard it as confiscatory, it will be understood from what we have said that they will be at liberty then to renew their application to the circuit court, without fear of being met by a plea

of *res judicata*. It will not be necessary to wait for a prosecution by the commission. We may add that, when the rate is fixed, a bill against the commission to restrain the members from enforcing it will not be bad as an attempt to enjoin legislation or as a suit against a state, and will be the proper form of remedy. *Reagan v. Farmers' Loan & T. Co.*, 154 U. S. 362. . . .

There is yet another difficulty in applying to these cases the comity which it is desirable if possible to apply. The Virginia statute of April 15, 1903, enacted to carry into effect the provision of the Constitution, requires, by § 34, certain, if not all, appeals to be taken and perfected within six months from the date of the order. Pollard's Code (Va.) 714. It may be that when an appeal is taken to the supreme court of appeals this section will be held to apply and the appeal be declared too late. We express no opinion upon the matter, which is for the state tribunals to decide, but simply notice a possibility. If the present bills should be dismissed, and then that possible conclusion reached, injustice might be done. As our decision does not go upon a denial of power to entertain the bills at the present stage, but upon our views as to what is the most proper and orderly course in cases of this sort when practicable, it seems to us that the bills should be retained for the present to await the result of the appeals if the companies see fit to take them. If the appeals are dismissed, as brought too late, the companies will be entitled to decrees. If they are entertained and the orders of the commission affirmed, the bills may be dismissed without prejudice and filed again.

Decrees reversed.

MR. JUSTICE BREWER dissented.<sup>6</sup>

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<sup>6</sup> Compare with the Prentis case, the case of *Bacon v. Rutland R. Co.*, 232 U. S. 134, 58 L. Ed. 538, 34 S. Ct. 283 (1914). The Vermont statute concerning review of Public Service Commission orders provided that the state supreme court might reverse or affirm the orders, but no power to modify was given. The United States Supreme Court held that the aggrieved railroad company could exercise a choice between the state supreme court review and the federal equity injunction.

The problem of the Prentis and Bacon cases is fully discussed in Lilienthal, "The Federal Courts and State Regulation of Public Utilities," 43 Harv. L. Rev. 379 (1930).

As to whether or not the Federal District Court proceedings are barred by the doctrine of *res judicata* after a statutory appeal is pursued to the state supreme court, see *Detroit & M. Ry. Co. v. Michigan Railroad Commission*, 235 U. S. 402, 59 L. Ed. 288, 35 S. Ct. 126 (1914), and *Grubb v. Public Utilities Commission of Ohio*, 281 U. S. 470, 74 L. Ed. 972, 50 S. Ct. 374 (1930). In the former case a writ of injunction was denied by the federal court on the ground of the prior judgment of the Michigan Supreme Court, and in answer to the plaintiff's contention that the doctrine of the Prentis case should be applied and the state court decision treated as a mere legislative step and hence no adjudication, the supreme court answered that since the Michigan court did

### Federal Statutes Curbing the Powers of the Federal Courts Over State Administrative Orders.

Section 24 of the Judicial Code (first adopted on March 3, 1875, 18 Stat. 470) gave the federal district courts original jurisdiction over all suits of a civil nature, at common law or in equity, when the amount in controversy exceeded \$3,000 and (a) the suit arose under the Constitution or laws of the United States, or (b) the suit was between citizens of different states. Under the authority of this section the enforcement of many state statutes and administrative orders has been enjoined by federal district courts, and this fact has engendered much animosity between the sovereign powers involved.

The provisions of section 24, as in effect from 1875 until 1910, gave a single federal district judge the power to issue an injunction in such cases, thus enabling a single person to restrain official state action which had received the sanction of many state officials or legislators. Such an arrangement enhanced the animosity on the part of the state officials.

In 1909 the South Dakota legislature passed a two cent fare law. The railroads made boast of the fact that within thirteen minutes of the time the governor signed the bill in the capital at Pierre, the federal court sitting in Sioux Falls had issued an injunction restraining him and all other state officials from enforcing it. This event, added to the feeling previously created by the enjoining of other state legislative and administrative action, caused a storm to break in Congress. Senator Crawford of South Dakota arose and demanded the passage of an amendment to the Judicial Code depriving the lower federal courts of jurisdiction in such cases.<sup>7</sup> The Senator's bill failed of passage, but instead in 1910 the so-called Overman amendment was passed providing that temporary injunctions restraining the enforcement of "state statutes" should be issued only if ordered by three federal judges, and providing further for a direct appeal to the United States Supreme Court.<sup>8</sup> This was the genesis of what is known as section 266 of the Judicial Code. The amendment did not explicitly refer to state administrative orders. It was a compromise measure.

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not have the power to "modify" the rate order of the commission, the state court action was judicial, and hence the doctrine of *res judicata* would apply.

Does it follow from this that if the state court action is "legislative" in nature the doctrine will not apply and that after the state court decision a Federal District Court injunction may be sought? In the Grubb case, *supra*, the United States Supreme Court was confronted with the question as to whether or not the doctrine of *res judicata* should be applied when the state supreme court had the power "to modify" the commission's decision. The Ohio Public Utilities Commission had refused to grant a certificate of convenience and necessity to the full extent applied for. Applicant had appealed to the Ohio Supreme Court which had the power "to modify." The Ohio court affirmed the commission's action. Should a Federal District Court injunction be available?

<sup>7</sup> 45 Congressional Record 7252.

<sup>8</sup> 36 Stat. 557 (Act of June 18, 1910).

About two years later the South Dakota Railroad Commission entered an order fixing maximum passenger fares at two and one-half cents per mile. Again the federal district judge, sitting alone, interfered, holding that the three-judge requirement of the Overman amendment did not apply to the orders of state commissions, because, even though they were "legislative" orders, they were not "state statutes." So the enforcement of the commission order was enjoined. Again the storm broke in Congress. Senator Crawford demanded an explicit provision protecting state administrative orders from single judge interference.<sup>9</sup> The amendment which he proposed to that effect was adopted in 1913, and it was further provided that whenever a state judicial proceeding should be brought to enforce a state statute or administrative order, if the state proceeding should be accompanied by a stay of enforcement of the objectionable statute or order until the determination of the case in state court, all proceedings in the federal courts should be stayed.<sup>10</sup> This stay provision would seem to give any state which desires to litigate its controversies in its own courts the full opportunity to do so by simply starting enforcement proceedings and issuing a stay order pending their determination. Unfortunately, however, but few states have had state judicial procedures adequate to take advantage of the provision. Furthermore, this portion of the amendment was so worded that the federal courts have held that it does not apply in cases in which temporary restraining orders are issued on the ground of irreparable loss or damage, pending hearing on the application for interlocutory injunction. It applies only when an injunction is requested without such temporary restraining order.<sup>11</sup> Since almost every case involving state administrative orders is alleged to be accompanied by irreparable damage requiring a temporary restraining order, the stay provision of section 266 proved a mere empty gesture.

On May 10, 1928, a three-judge court in New York, sitting pursuant to the requirements of section 266, enjoined the Transit Commission from interfering with the charging of a seven cent fare in the New York subways.<sup>12</sup> This decision was subsequently reversed by the Supreme Court of the United States, but meanwhile Senator Wagner of New York arose in Congress and demanded that section 24 be amended to abolish completely federal equity power over public utility commission orders. Senator Wagner's bill was referred to the Judiciary Committee and was never reported out, but finally on May 14, 1934 after the lapse of six more years, during which numerous bills of

<sup>9</sup> 49 Congressional Record 3870.

<sup>10</sup> 37 Stat. 1013 (Act of March 4, 1913).

<sup>11</sup> *Union Light, Heat & Power Co. v. Railroad Commission*, 17 F. (2d) 143 (1926).

<sup>12</sup> *Gilchrist v. Interborough Rapid Transit Co.*, 26 F. (2d) 912 (1928), subsequently reversed by the United States Supreme Court, 279 U. S. 159, 73 L. Ed. 652, 49 S. Ct. 282 (1929).

similar purport were introduced into Congress and discussed at length, the so-called Johnson Act was adopted. This act as amended deprives the federal district courts of jurisdiction to enjoin the enforcement of state administrative orders when such orders (a) involve tax matters or affect rates chargeable by a public utility, (b) do not interfere with interstate commerce, and (c) have been made after a reasonable notice and hearing, and where a plain, speedy, and efficient remedy may be had at law or in equity in the state courts. The Johnson Act constitutes the most recent statutory event in a generation or more of conflict between state sovereignty, presumably attempting to promote the state's general welfare, and federal sovereignty, attempting to guard interests supposedly protected by the Constitution. The Act calls for and is now in the process of being interpreted by the courts. While much will depend upon the results of this interpretation, it is probably safe enough to predict that the major political issue is not yet finally settled.<sup>13</sup>

Provisions of section 266 of the Judicial Code, and those of the Johnson Act as amended by the 1948 Revision of the Judicial Code, are as follows:

### Provisions for Three-Judge Court

62 Stat. 968, c. 646 (28 USC §§ 2281, 2284)

*Injunction Against Enforcement of State Statute . . .* An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

*Three-Judge District Court; Composition; Procedure.* In any action or proceeding required by Act of Congress to be heard and determined by a district court of three judges the composition and procedure of the court, except as otherwise provided by law, shall be as follows:

<sup>13</sup> The story of section 266 and the Johnson Act can be gleaned from the following sources: Lillienthal, "The Federal Courts and State Regulation of Public Utilities," 43 Harv. L. Rev. 379 (1930); Pogue, "State Determination of State Law and the Judicial Code," 41 Harv. L. Rev. 623 (1928); Hutcheson, "A Case for Three Judges," 47 Harv. L. Rev. 795 (1934); Bowen, "When Are Three Federal Judges Required?" 16 Minn. L. Rev. 1 (1931); Burgess, "Recent Efforts to Immunize Orders Against Judicial Review," 16 Iowa L. Rev. 55 (1930); Merrill, "Recent Efforts to Immunize Commission Orders Against Judicial Review: A Reply," 16 Iowa L. Rev. 62 (1930); Warren, "Federal and State Court Interference," 43 Harv. L. Rev. 345 (1930); Lockwood, Maw and Rosenberry, "The Use of the Federal Injunction," 43 Harv. L. Rev. 426 (1930); Notes and Comments, 32 Mich. L. Rev. 1154 (1934); 20 Iowa L. Rev. 128 (1934); 30 Ill. L. Rev. 215 (1935); Hearings Before the Committee on the Judiciary of the House of Representatives on the Johnson Bill (5752), Feb. 27, 28, March 1, 1934.

(1) The district judge to whom the application for injunction or other relief is presented shall constitute one member of such court. On the filing of the application, he shall immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge. Such judges shall serve as members of the court to hear and determine the action or proceeding.

(2) If the action involves the enforcement, operation or execution of State statutes or State administrative orders, at least five days' notice of the hearing shall be given to the governor and attorney general of the State.

If the action involves the enforcement, operation or execution of an Act of Congress or an order of any department or agency of the United States, at least five days' notice of the hearing shall be given to the Attorney General of the United States, to the United States attorney for the district, and to such other persons as may be defendants.

Such notice shall be given by registered mail by the clerk, and shall be complete on the mailing thereof.

(3) In any such case in which an application for an interlocutory injunction is made, the district judge to whom the application is made may, at any time, grant a temporary restraining order to prevent irreparable damage. The order, unless previously revoked by the district judge, shall remain in force only until the hearing and determination by the full court. It shall contain a specific finding, based upon evidence submitted to such judge and identified by reference thereto, that specified irreparable damage will result if the order is not granted.

(4) In any such case the application shall be given precedence and assigned for a hearing at the earliest practicable day. Two judges must concur in granting the application.

(5) Any one of the three judges of the court may perform all functions, conduct all proceedings except the trial, and enter all orders required or permitted by the rules of civil procedure. A single judge shall not appoint a master or order a reference, or hear and determine any application for an interlocutory injunction or motion to vacate the same, or dismiss the action, or enter a summary or final judgment. The action of a single judge shall be reviewable by the full court at any time before final hearing.

A district court of three judges shall, before final hearing, stay any action pending therein to enjoin, suspend or restrain the enforcement or execution of a State statute or order thereunder, whenever it appears that a State court of competent jurisdiction has stayed proceedings under such statute or order pending the determination in such State court of an action to enforce the same. If the action in the State court is not prosecuted diligently and in good faith, the district court of three judges may vacate its stay after hearing upon ten days' notice served upon the attorney general of the State.

### **The Johnson Act**

62 Stat. 932, c. 646 (28 USC §§ 1341, 1342)

*Taxes by States.* The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

*Rate Orders of State Agencies.* The district courts shall not enjoin, suspend or restrain the operation of, or compliance with, any order affecting rates chargeable by a public utility and made by a State administrative agency or a rate-making body of a State political subdivision, where:

- (1) Jurisdiction is based solely on diversity of citizenship or repugnance of the order to the Federal Constitution; and,
- (2) The order does not interfere with interstate commerce; and,
- (3) The order has been made after reasonable notice and hearing; and,
- (4) A plain, speedy and efficient remedy may be had in the courts of such State.

#### **Deference to State Courts.**

**Railroad Commission of Texas v. Pullman Co., Supreme Court of the United States, 1940. 312 U. S. 496, 85 L. Ed. 971, 61 S. Ct. 643.**

MR. JUSTICE FRANKFURTER delivered the opinion of the court.

In those sections of Texas where the local passenger traffic is slight, trains carry but one sleeping car. These trains, unlike trains having two or more sleepers, are without a Pullman conductor; the sleeper is in charge of a porter who is subject to the train conductor's control. As is well known, porters on Pullmans are colored and conductors are white. Addressing itself to this situation, the Texas Railroad Commission after due hearing ordered that "no sleeping car shall be operated on any line of railroad in the State of Texas . . . unless such cars are continuously in the charge of an employee . . . having the rank and position of Pullman conductor." Thereupon, the Pullman Company and the railroads affected brought this action in a federal district court to enjoin the Commission's order. Pullman porters were permitted to intervene as complainants, and Pullman conductors entered the litigation in support of the order. Three judges having been convened, Judicial Code, § 266, as amended, 28 USC § 380, the court enjoined enforcement of the order. From this decree, the case came here directly. Judicial Code, § 238, as amended, 28 USC § 345.

The Pullman Company and the railroads assailed the order as unauthorized by Texas law as well as violative of the Equal Protection, the Due Process and the Commerce Clauses of the Constitution. The intervening porters adopted these objections but mainly objected to the order as a discrimination against Negroes in violation of the Fourteenth Amendment.

The complaint of the Pullman porters undoubtedly tendered a substantial constitutional issue. It is more than substantial. It touches a sensitive area of social policy upon which the federal courts ought not to enter unless no alternative to its adjudication is open. Such constitutional adjudication plainly can be avoided if a definitive ruling on the state issue would terminate the controversy. It is therefore our duty to turn to a consideration of question under Texas law.



The Commission found justification for its order in a Texas statute which we quote in the margin.<sup>14</sup> It is common ground that if the order is within the Commission's authority its subject matter must be included in the Commission's power to prevent "unjust discrimination . . . and to prevent any and all other abuses" in the conduct of railroads. Whether arrangements pertaining to the staffs of Pullman cars are covered by the Texas concept of "discrimination" is far from clear. What practices of the railroads may be deemed to be "abuses" subject to the Commission's correction is equally doubtful. Reading the Texas statutes and the Texas decisions as outsiders without special competence in Texas law, we would have little confidence in our independent judgment regarding the application of that law to the present situation. The lower court did deny that the Texas statutes sustained the Commission's assertion of power. And this represents the view of an able and experienced circuit judge of the circuit which includes Texas and of two capable district judges trained in Texas law. Had we or they no choice in the matter but to decide what is the law of the state, we should hesitate long before rejecting their forecast of Texas law. But no matter how seasoned the judgment of the district court may be, it cannot escape being a forecast rather than a determination. The last word on the meaning of Article 6445 of the Texas Civil Statutes, and therefore the last word on the statutory authority of the Railroad Commission in this case, belongs neither to us nor to the district court but to the supreme court of Texas. In this situation a federal court of equity is asked to decide an issue by making a tentative answer which may be displaced tomorrow by a state adjudication. *Glenn v. Field Packing Co.*, 290 U. S. 177; *Lee v. Bickell*, 292 U. S. 415. The reign of law is hardly promoted if an unnecessary ruling of a federal court is thus supplanted by a controlling decision of a state court. The resources of equity are equal to an adjustment that will avoid the waste of a

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<sup>14</sup> Vernon's Anno. Texas Civil Statutes, Article 6445:

"Power and authority are hereby conferred upon the Railroad Commission of Texas over all railroads, and suburban, belt and terminal railroads, and over all public wharves, docks, piers, elevators, warehouses, sheds, tracks and other property used in connection therewith in this State, and over all persons, associations and corporations, private or municipal, owning or operating such railroad, wharf, dock, pier, elevator, warehouse, shed, track or other property to fix, and it is hereby made the duty of the said Commission to adopt all necessary rates, charges and regulations, to govern and regulate such railroads, persons, associations and corporations, and to correct abuses and prevent unjust discrimination in the rates, charges and tolls of such railroads, persons, associations and corporations, and to fix division of rates, charges and regulations between railroads and other utilities and common carriers where a division is proper and correct, and to prevent any and all other abuses in the conduct of their business and to do and perform such other duties and details in connection therewith as may be provided by law."

tentative decision as well as the friction of a premature constitutional adjudication.

An appeal to the chancellor, as we had occasion to recall only the other day, is an appeal to the "exercise of the sound discretion, which guides the determination of courts of equity." *Beal v. Missouri Pacific R. R.*, No. 72, decided January 20, 1941. The history of equity jurisdiction is the history of regard for public consequences in employing the extraordinary remedy of the injunction. There have been as many and as variegated applications of this supple principle as the situations that have brought it into play. See, for modern instances, *Beasley v. Texas & Pacific Ry.*, 191 U. S. 492; *Harrisonville v. Dickey Clay Co.*, 289 U. S. 334; *United States v. Dern*, 289 U. S. 352. Few public interests have a higher claim upon the discretion of a federal chancellor than the avoidance of needless friction with state policies, whether the policy relates to the enforcement of the criminal law, *Fenner v. Boykin*, 271 U. S. 240; *Spielman Motor Co. v. Dodge*, 295 U. S. 89; or the administration of a specialized scheme for liquidating embarrassed business enterprises, *Pennsylvania v. Williams*, 294 U. S. 176; or the final authority of a state court to interpret doubtful regulatory laws of the state, *Gilchrist v. Interborough Co.*, 279 U. S. 159; cf. *Hawks v. Hamill*, 288 U. S. 52, 61. These cases reflect a doctrine of abstention appropriate to our federal system whereby the federal courts, "exercising a wise discretion," restrain their authority because of "scrupulous regard for the rightful independence of the state governments" and for the smooth working of the federal judiciary. See *Cavanaugh v. Looney*, 248 U. S. 453, 457; *Di Giovanni v. Camden Ins. Assn.*, 296 U. S. 64, 73. This use of equitable powers is a contribution of the courts in furthering the harmonious relation between state and federal authority without the need of rigorous congressional restriction of those powers. Compare 37 Stat. 1013; Judicial Code, § 24 (1), as amended, 28 USC § 41 (1); 47 Stat. 70, 29 USC §§ 101-115.

Regard for these important considerations of policy in the administration of federal equity jurisdiction is decisive here. If there was no warrant in state law for the Commission's assumption of authority there is an end of the litigation; the constitutional issue does not arise. The law of Texas appears to furnish easy and ample means for determining the Commission's authority. Article 6453 of the Texas Civil Statutes gives a review of such an order in the state courts. Or, if there are difficulties in the way of this procedure of which we have not been apprised, the issue of state law may be settled by appropriate action on the part of the State to enforce obedience to the order. *Beal v. Missouri Pacific R. R.*, *supra*; Article 6476, Texas Civil Statutes. In the absence of any showing that these obvious methods for securing a definitive ruling in the state courts cannot be pursued with full protection of the constitutional claim, the district court should exercise its wise discretion

by staying its hands. Compare *Thompson v. Magnolia Co.*, 309 U. S. 478.

We therefore remand the cause to the district court, with directions to retain the bill pending a determination of proceedings, to be brought with reasonable promptness, in the state court in conformity with this opinion. Compare *Atlas Ins. Co. v. Southern, Inc.*, 306 U. S. 563, 573, and cases cited.

Reversed and remanded.<sup>15</sup>

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<sup>15</sup> Compare *Burford v. Sun Oil Co.*, 319 U. S. 315, 87 L. Ed. 1424, 63 S. Ct. 1098 (1943)—a 5 to 4 decision—denying to the federal district courts power to enjoin an order of the Texas Railroad Commission granting an exception to the general restrictions of the Commission's Rule 37 prescribing the spacing for drilling oil wells in the state. The supreme court held that aggrieved persons must first seek relief in the state courts. The supreme court reached this conclusion notwithstanding the fact that the power of the Texas courts was restricted to passing upon the "validity" commission orders, and hence might logically be called "judicial." In explaining the conclusion the supreme court, speaking by Mr. Justice Black, described the relationship between the Texas Railroad Commission and the Texas courts as follows:

"With full knowledge of the importance of the decisions of the Railroad Commission both to the state and to the oil operators, the Texas legislature has established a system of thorough judicial review by its own state courts. The commission orders may be appealed to a state district court in Travis County, and are reviewed by a branch of the Court of Civil Appeals and by the state supreme court. While the constitutional power of the Commission to enforce Rule 37 or to make exceptions to it is seldom seriously challenged, *Brown v. Humble Oil & Ref. Co.*, 126 Tex. 296, 307, the validity of particular orders from the standpoint of statutory interpretation may present a serious problem, and a substantial number of such cases have been disposed of by the Texas courts which alone have the power to give definite answers to the questions of state law posed in these proceedings.

"In describing the relation of the Texas court to the Commission no useful purpose will be served by attempting to label the court's position as legislative, *Prentis v. Atlantic Coast Line*, 211 U. S. 210, 53 L. Ed. 150, 29 S. Ct. 67; *Keller v. Potomac Elec. Power Co.*, 261 U. S. 428, 67 L. Ed. 731, 43 S. Ct. 445, or Judicial, *Bacon v. Rutland R. Co.*, 232 U. S. 134, 58 L. Ed. 538, 34 S. Ct. 283—suffice it to say that the Texas courts are working partners with the Railroad Commission in the business of creating a regulatory system for the oil industry. The Commission is charged with principal responsibility for fact finding and for policy making and the courts expressly disclaim the administrative responsibility, *Gulf Land Co. v. Atlantic Refining Co.*, 134 Tex. 59, but on the other hand, the orders of the Commission are tested for reasonableness by trial de novo before the court, *Commission v. Shell Oil Co.*, 139 Tex. 66, 76-80, and the court may on occasion make a careful analysis of all the facts of the case in reversing a Commission order. *Railroad Commission v. Gulf Production Co.*, 134 Tex. 122. The court has fully as much power as the Commission to determine particular cases, since after trial de novo, it can either restrain the lease-holder from proceeding to drill, or if the case is appropriate, can restrain the Commission from interfering with the lease-holder. The court may even formulate new standards for the Commission's administrative practice and suggest that the Commission adopt them. Thus, in the *Shell Oil* case, *supra*, at

**Alabama Public Service Commission v. Southern Ry. Co., Supreme Court of the United States, 1951. 341 U. S. 341, 95 L. Ed. 1002, 71 S. Ct. 762.**

MR. CHIEF JUSTICE VINSON delivered the opinion of the court.

The Southern Railway Company, appellee, brought this action in the federal district court to enjoin the members of the Alabama Public Service Commission and the Attorney General of Alabama, appellants, from enforcing laws of Alabama prohibiting discontinuance of certain railroad passenger service. Appellee's Alabama intrastate service is governed by a statute prohibiting abandonment of "any portion of its service to the public . . . unless and until there shall first have been filed an application for a permit to abandon service and obtained from the commission a permit allowing such abandonment." Ala. Code, 1940, Tit. 48, § 106. Severe penalties are prescribed for wilful violation of regulatory statutes or orders of the Commission by utilities or their employees. Id. §§ 399, 400, 405.

Appellee operates a railroad system throughout the South. This case, however, involves only that Alabama intrastate passenger service furnished by trains Nos. 7 and 8 operated daily between Tuscumbia, Alabama, and Chattanooga, Tennessee, a distance of approximately 145 miles mainly within Alabama. On September 13, 1948, appellee applied to the Alabama Public Service Commission for permission to discontinue trains Nos. 7 and 8 alleging that public use of the service had so declined that revenues fell far short of meeting direct operating expenses. After hearing evidence at Huntsville, Alabama, one of the communities served by the trains, the Commission entered an order on April 3, 1950, denying permission to discontinue on the grounds that there exists a public need for the service and that appellee had not attempted to reduce losses through adoption of more economical operating methods.

Instead of pursuing its right of appeal to the state courts, appellee filed a complaint in the United States District Court alleging diversity of citizenship and that requiring continued operation of trains Nos. 7 and

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73, the court took the responsibility of 'laying down some standard to guide the Commission in the exercise of its discretion' in Rule 37 cases and in *Brown v. Humble Oil & Ref. Co.*, supra, 312, the court explicitly suggested a revision in Rule 37."

Justice Frankfurter speaking for the dissenting minority took the position that the majority opinion virtually puts an end by judicial decision to the concurrent jurisdiction of federal courts in such cases. He said:

"The opinion of the court cuts deep into our judicial fabric. The duty of the judiciary is to exercise the jurisdiction which Congress has conferred. What the court is doing today I might wholeheartedly approve of if it were done by Congress. But I cannot justify translation of the circumstance of my membership on this court into an opportunity of writing my private view of legislative policy into the law and thereby effacing a far greater area of diversity jurisdiction that Senator Norris, as chairman of the Senate Judiciary Committee, was even able to persuade Congress itself to do."

8 at an out-of-pocket loss amounted to a confiscation of its property in violation of the Due Process Clause of the Fourteenth Amendment. Injunctive relief was prayed to protect appellee from irreparable loss, flowing on the one hand from operating losses in complying with Alabama law or, on the other, from severe penalties for discontinuance of service in the face of that law. A three-judge court heard evidence, made its own findings of fact and entered judgment holding the Commission order void and permanently enjoining appellants from taking any steps to enforce either the Commission order or the penalty provisions of the Alabama Code in relation to the discontinuance of trains Nos. 7 and 8. 91 F. Supp. 980 (1950). The case is properly here on appeal, 28 USC (Supp. III) § 1253.

Federal jurisdiction in this case is grounded upon diversity of citizenship as well as the allegation of a federal question. Exercise of that jurisdiction does not involve construction of a state statute so ill-defined that a federal court should hold the case pending a definitive construction of that statute in the state courts, e. g., *Railroad Commission of Texas v. Pullman Co.*, 312 U. S. 496 [61 S. Ct. 643, 85 L. Ed. 971 (1941)]; *Shipman v. DuPre*, 339 U. S. 321 [70 S. Ct. 640, 94 L. Ed. 877 (1950)]. We also put to one side those cases in which the constitutionality of a state statute itself is drawn into question, e. g., *Toomer v. Witsell*, 334 U. S. 385 [68 S. Ct. 1156, 92 L. Ed. 1460 (1948)]. For in this case appellee attacks a state administrative order issued under a valid regulatory statute designed to assure the provision of adequate intrastate service by utilities operating within Alabama.

Appellee takes the position, adopted by the court below, that whenever a plaintiff can show irreparable loss caused by an allegedly invalid state administrative order ripe for judicial review in the state courts the presence of diversity of citizenship or a federal question opens the federal courts to litigation as to the validity of that order, at least so long as no action involving the same subject matter is actually pending in the state courts. But, it by no means follows from the fact of district court jurisdiction that such jurisdiction must be exercised in this case. As framed by the court in *Burford v. Sun Oil Co.*, 319 U. S. 315, 318 [63 S. Ct. 1098, 1099, 87 L. Ed. 1424 (1943)], the question before us is: "Assuming that the federal district court had jurisdiction, should it, as a matter of sound equitable discretion, have declined to exercise that jurisdiction here?"

The Alabama Commission, after a hearing held in the area served, found a public need for the service. The court below, hearing evidence *de novo*, found that no public necessity exists in view of the increased use and availability of motor transportation. We do not attempt to resolve these inconsistent findings of fact. We take note, however, of the fact that a federal court has been asked to intervene in resolving the

essentially local problem of balancing the loss to the railroad from continued operation of trains Nos. 7 and 8 with the public need for that service in Tusculumbia, Decatur, Huntsville, Scottsboro, and the other Alabama communities directly affected.

Not only has Alabama established its Public Service Commission to pass upon a proposed discontinuance of intrastate transportation service, but it has also provided for appeal from any final order of the Commission to the circuit court of Montgomery County as a matter of right. Ala. Code 1940, Tit. 48, § 79. That court, after a hearing on the record certified by the Commission, is empowered to set aside any Commission order found to be contrary to the substantial weight of the evidence or erroneous as a matter of law, id. § 82, and its decision may be appealed to the Alabama supreme court. Id. § 90. Statutory appeal from an order of the Commission is an integral part of the regulatory process under the Alabama Code. Appeals, concentrated in one circuit court, are "supervisory in character." *Avery Freight Lines, Inc. v. White*, 245 Ala. 618, 622-623, 18 So. 2d 394, 398, 154 A. L. R. 732 (1944). The supreme court of Alabama has held that it will review an order of the Commission as if appealed directly to it, *Alabama Public Service Commission v. Nunis*, 252 Ala. 30, 34, 39 So. 2d 409, 412 (1949), and that judicial review calls for an independent judgment as to both law and facts when a denial of due process is asserted. *Alabama Public R. Comm.*, 235 U. S. 402 [35 S. Ct. 126, 59 L. Ed. 288 (1914)]; 11-12, 42 So. 2d 655, 662 (1949).

The fact that review in the Alabama courts is limited to the record taken before the Commission presents no constitutional infirmity. *Washington ex rel. Oregon R. and N. Co. v. Fairchild*, 224 U. S. 510 [32 S. Ct. 535, 56 L. Ed. 863 (1912)]. And, whatever the scope of review of Commission findings when an alleged denial of constitutional rights is in issue, it is now settled that a utility has no right to relitigate factual questions on the ground that constitutional rights are involved. *New York v. United States*, 331 U. S. 284, 334-336 [67 S. Ct. 1207, 1233, 1234, 91 L. Ed. 1492 (1947)]; *Railroad Commission of Texas v. Rowan & Nichols Oil Co.*, 311 U. S. 570, 576 [61 S. Ct. 343, 346, 85 L. Ed. 358 (1941)]. Appellee complains of irreparable injury resulting from the Commission order pending judicial review, but has not invoked the protective powers of the Alabama courts to direct the stay or supersedeas of a Commission order pending appeal. Ala. Code 1940, Tit. 48, §§ 81, 84. Appellee has not shown that the Alabama procedure for review of Commission orders is in any way inadequate to preserve for ultimate review in this court any federal questions arising out of such orders.

As adequate state court review of an administrative order based upon predominantly local factors is available to appellee, intervention of a federal court is not necessary for the protection of federal rights.

Equitable relief may be granted only when the district court, in its sound discretion exercised with the "scrupulous regard for the rightful independence of state governments which should at all times actuate the federal courts," is convinced that the asserted federal right cannot be preserved except by granting the "extraordinary relief of an injunction in the federal courts." Considering that "[f]ew public interests have a higher claim upon the discretion of a federal chancellor than the avoidance of needless friction with state policies," the usual rule of comity must govern the exercise of equitable jurisdiction by the district court in this case. Whatever rights appellee may have are to be pursued through the state courts. *Burford v. Sun Oil Co.*, 319 U. S. 315 [63 S. Ct. 1098, 87 L. Ed. 1424 (1943)]; *Railroad Commission of Texas v. Rowan & Nichols Oil Co.*, 311 U. S. 570, 577, 61 S. Ct. 343, 346, 85 L. Ed. 358 (1941); *Railroad Commission of Texas v. Rowan & Nichols Oil Co.*, 310 U. S. 573 [60 S. Ct. 1021, 84 L. Ed. 1368 (1940)], as amended, 311 U. S. 614, 615 [61 S. Ct. 67, 85 L. Ed. 390 (1940)].

The Johnson Act, 48 Stat. 775 (1934), now 28 USC (Supp. III) § 1342, does not affect the result in this case. That Act deprived federal district courts of jurisdiction to enjoin enforcement of certain state administrative orders affecting public utility rates where "A plain, speedy and efficient remedy may be had in the courts of such State." As the order of the Alabama Service Commission involved in this case is not one affecting appellee's rates, the Johnson Act is not applicable. We have assumed throughout this opinion that the court below had jurisdiction [341 U. S. 345], but hold that jurisdiction should not be exercised in this case as a matter of sound equitable discretion.

As this court held in *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U. S. 293, 297-298 [63 S. Ct. 1070, 1072, 1073, 87 L. Ed. 1407 [(1943)]]:

"This withholding of extraordinary relief by courts having authority to give it is not a denial of the jurisdiction which Congress has conferred on the federal courts . . . On the contrary, it is but a recognition . . . that a federal court of equity . . . should stay its hand in the public interest when it reasonably appears that private interests will not suffer. . . .

"It is in the public interest that federal courts of equity should exercise their discretionary power to grant or withhold relief so as to avoid needless obstruction of the domestic policy of the states."

For the foregoing reasons, the judgment of the district court is reversed.

MR. JUSTICE FRANKFURTER, whom MR. JUSTICE JACKSON joins, concurring in the result.

. . .  
. . . The lack of merit in the plaintiff's case is so clear that it calls for dismissal of the complaint.

Instead, as we have stated, this court rests its decision on a ground that requires it to overturn a long course of decisions and, in effect, to repeal an act of Congress defining the jurisdiction of the district courts. It is undisputed that the plaintiff is asserting a claim under the Federal Constitution. The court admits that the district court has jurisdiction of the suit. 28 USC §§ 1331, 1332. It is said, however, that the district court must decline to exercise this jurisdiction because judicial review of the order could have been had in the State courts.

In 1875, Congress for the first time (barring the abortive Act of 1801) opened the federal courts to claims based on a right under the Constitution or laws of the United States. Act of March 3, 1875, 18 Stat. 470. Theretofore such claims had to be pursued in the State courts and brought to this court for review of the federal question under § 25 of the Judiciary Act of 1789, 1 Stat. 73, 85. In *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362, 391 [14 S. Ct. 1047, 1052, 38 L. Ed. 1014 (1894)], we rejected the argument that suit could not be brought in the federal court to restrain the enforcement of a State agency order. The court has consistently held to the view that it cannot overrule the determination of Congress as to whether federal courts should be allowed jurisdiction, concurrent with the State courts, even where the plaintiff seeks to restrain action of a State agency. *Smyth v. Ames*, 169 U. S. 466, 516 [18 S. Ct. 418, 422, 42 L. Ed. 819 (1898)]; *Willcox v. Consolidated Gas Co.*, 212 U. S. 19, 40 [29 S. Ct. 192, 195, 53 L. Ed. 382 (1909)]; *Bacon v. Rutland R. Co.*, 232 U. S. 134, 137 [34 S. Ct. 283, 284, 58 L. Ed. 538 (1914)]; *Detroit & Mackinac Ry. Co. v. Michigan R. Comm.*, 235 U. S. 402 [35 S. Ct. 126, 59 L. Ed. 288 (1914)]; *Oklahoma N. Gas Co. v. Russell*, 261 U. S. 290, 293 [43 S. Ct. 353, 354, 67 L. Ed. 659 (1923)]; *Prendergast v. New York Telephone Co.*, 262 U. S. 43, 47 [43 S. Ct. 466, 468, 67 L. Ed. 853 (1923)]; *Pacific Telephone & Telegraph Co. v. Kuykendall*, 265 U. S. 196, 201 [44 S. Ct. 553, 555, 68 L. Ed. 975 (1924)]; *Railroad & Warehouse Comm. of Minnesota v. Duluth St. Ry. Co.*, 273 U. S. 625, 628 [47 S. Ct. 489, 490, 71 L. Ed. 807 (1927)]; see *Prentis v. Atlantic Coast Line Co.*, 211 U. S. 210, 228 [29 S. Ct. 67, 70, 53 L. Ed. 150 (1908)].

These cases can be overruled. They cannot be explained away. The theory of the cases now discarded was clearly stated in *Willcox v. Consolidated Gas Co.*, *supra*, decided the same Term as the *Prentis* case: "That the case may be one of local interest only is entirely immaterial, so long as the parties are citizens of different states or a question is involved which, by law, brings the case within the jurisdiction of a federal court. The right of a party plaintiff to choose a federal court where there is a choice cannot be properly denied." 212 U. S. at 40 [29 S. Ct. at page 195]. What the court today holds is that if a plaintiff can be sent to a State court to challenge an agency order there is no federal court available to him. Since the body of decisions which hold the



contrary is thus to be discarded, they ought not to be left as derelicts on the waters of the law.

In Congress, a prolonged debate has ensued over the wisdom of the broad grants of power made to the federal courts of original jurisdiction—power which may be invoked against State regulation of economic enterprise. Bill after bill has been proposed to prevent the lower federal courts from interfering with such State action. Finally, in 1910, by a provision in the Mann-Elkins Act, Congress provided that an action for an interlocutory injunction to restrain the action of a State officer acting under a statute alleged to violate the Federal Constitution be heard by a court of three judges, with a right of direct appeal to the Supreme Court. Act of June 18, 1910, § 17, 36 Stat. 539, 557. In 1913, this procedure was extended to applications for an interlocutory injunction to restrain enforcement of the order of a State board or commission. Act of March 4, 1913, 37 Stat. 1013. By the same statute, a State was empowered to keep litigation concerning the validity of State agency regulation in its own courts if it was willing to stay the administrative order. In 1925, the provision for a three-judge court and direct appeal was extended to a permanent injunction. Act of Feb. 13, 1925 [c. 229] 43 Stat. 936, 938.

Congress, fully aware of the problem, was still not satisfied with the jurisdiction it had left to the federal district courts. Accordingly, in 1934, it passed the Johnson Act which withdrew their jurisdiction over suits to enjoin the enforcement of state rate orders, providing that a remedy was available in the State courts. Act of May 14, 1934, 48 Stat. 775. This restriction on a district court is not here applicable, for the order in controversy is not a rate order. In 1937, Congress further limited federal jurisdiction by providing that a district court could not enjoin enforcement of a State tax statute where a remedy was available in the State courts. Act of Aug. 21, 1937, 50 Stat. 738.

Plainly we are concerned with a jurisdictional issue which has been continuously before Congress and with which it has dealt by explicit and detailed legislation. Congress first made a broad grant of jurisdiction to the federal courts as to all constitutional and other federal claims. Experience gave rise to dissatisfaction with this grant and Congress began to hedge and limit the power. It required that the case be heard by three judges, that a speedy appeal be available, and that the State courts could have exclusive jurisdiction if they would stay the administrative order. It withdrew jurisdiction to enjoin enforcement of State statutes and orders in the two fields where the greatest dissatisfaction with federal jurisdiction existed—rate orders and taxation—so long as a State remedy was available. But Congress did not take away the power of the district court to decide a case like the one before us. Instead, it recognized by the wording of § 17 of the Mann-Elkins Act and later legislation that it had given a right to resort to the federal courts and

that such power was an obligatory jurisdiction, not to be denied because as a matter of policy it might be more desirable to raise such constitutional claims in a State court.

The court rejects the guidance of these amendatory acts, all placing specific limitations upon the exercise of district court jurisdiction in cases affecting local regulation. Instead, the court now limits the jurisdiction of the federal courts as though Congress had amended § 1331 of Title 28 to read: "The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of \$3,000, exclusive of interest and costs, and arises under the Constitution, laws or treaties of the United States, *provided that the district courts shall not exercise this jurisdiction where a suit involves a challenge to an order of a state regulatory commission.*" (New matter in italics.)

It does not change the significance of the court's decision to coat it with the sugar of equity maxims. As we have seen, there is no warrant in the decisions of this court for saying that the plaintiff has an "adequate remedy at law" merely because he may bring suit in the State courts. An "adequate remedy at law," as a bar to equitable relief in the federal courts, refers to a remedy on the law side of federal courts. . . .

. . . It [the federal court] should avoid decision of a constitutional question when construction of a State statute in the State courts may make such a decision unnecessary. *Railroad Commission of Texas v. Pullman Co.*, 312 U. S. 496 [61 S. Ct. 643, 85 L. Ed. 971 (1941)]. It may decline to consider a case which involves a specialized aspect of a complicated system of local law outside the normal competence of a federal court. *Burford v. Sun Oil Co.*, 319 U. S. 315, 332 et seq. [63 S. Ct. 1098, 1106, 87 L. Ed. 1424 (1943)]. In that case, the majority found that the technicalities of oil regulation and the importance of competent, uniform review made it proper for the district court to decline to exercise its equity jurisdiction. Again, an equity court, like a court of law for that matter, ought not to hear a case before the plaintiff has exhausted all available nonjudicial legal remedies. *Prentis v. Atlantic Coast Line R. Co.*, supra.

Here the plaintiff has exhausted his nonjudicial remedies. *Avery Freight Lines, Inc. v. Persons*, 250 Ala. 40, 32 So. 2d 886 (1947). Concededly there is no State statute to construe. There is no consideration which should make a court of equity, as a matter of discretion, decline to entertain a bill for an injunction. Nor does the situation in this suit involve a specialized field of State law in which out-of-state federal judges are not at home. On the contrary, the claim that is made here is within the easy grasp of federal judges, and certainly within the competence of three judges bred in Alabama law, with wide experience in its administration. The only reason for declining to entertain the suit is that it may well be more desirable as a matter of State-Federal relations for the order of a State agency to be reviewed originally in the

State lower court and not to be challenged in the first instance in a federal court. It is not for me to quarrel with the wisdom of such a policy. But Congress, in the constitutional exercise of its power to define the jurisdiction of the inferior courts, has decided otherwise.

Equity by its very nature denies relief if, on balance of considerations of convenience relevant to equity, it would be inequitable to grant the extraordinary remedy of an injunction. Federal courts of equity have always acted on this equitable doctrine. [It needed no legislation to withdraw the jurisdiction of federal courts in such situations.] But it was never a doctrine of equity that a federal court should exercise its judicial discretion to dismiss a suit merely because a State court could entertain it.

This is so because discretion based solely on the availability of a remedy in the State courts would for all practical purposes repeal the Act of 1875. This Act gave to the federal courts a jurisdiction not theretofore possessed so that a State could not tie up a litigant making such a claim by requiring that he bring suit for redress in its own courts. That jurisdiction was precisely the jurisdiction to hear constitutional challenge to local action on the basis of the vast limitations placed upon State action by the Civil War amendments. And precisely because of objections to the choice of courts given plaintiffs by the Act of 1875, Congress, by piecemeal restrictive legislation, did require that some federal claims against local regulatory action be litigated originally in State courts and from there brought here for review.

By one fell swoop the Court now finds that Congress indulged in needless legislation in the Acts of 1910, 1913, 1925, 1934 and 1937. By these measures, Congress, so the court now decides, gave not only needless but inadequate relief, since it now appears that the federal courts have inherent power to sterilize the Act of 1875 against all proceedings challenging local regulation. For if this decision means anything beyond disposing of this particular litigation it means that hereafter no federal court should entertain a suit against any action of a State agency. For every State must afford judicial review in its courts of a claim under the Due Process Clause if such claim would give a federal court jurisdiction. In the absence of such judicial review in the State courts, State action under the doctrine of *Ohio Valley [Water] Co. v. Borough of Ben Avon*, 253 U. S. 287 [40 S. Ct. 527, 64 L. Ed. 908 (1920)], would be nugatory because unconstitutional.

I regret my inability to make clear to the majority of this court that its [decision and the principle underlying it are] in flagrant contradiction with the unbroken course of decisions in this court for seventy-five years.<sup>16</sup>

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<sup>16</sup> This decision has important bearings on the problems involved in *Railroad Commission of Texas v. Rowan & Nichols Oil Co.*, *infra*, ch. IX. The two cases may profitably be considered in conjunction with each other.

**Problems as to Appropriate Timing**

**City Bank Farmers Trust Co., Executor v. Schnader, Attorney General of Pennsylvania, Supreme Court of the United States, 1934. 291 U. S. 24, 78 L. Ed. 628, 54 S. Ct. 259.**

Appeal from a decree of the District Court, of three judges, dismissing a bill to enjoin the Attorney General and the Secretary of Revenue of the Commonwealth of Pennsylvania from imposing and collecting an inheritance tax on personal property left by a New York decedent, which, as the plaintiff executor averred, had no taxable situs in the Commonwealth.

MR. JUSTICE ROBERTS delivered the opinion of the court.

The appellant, by a bill filed in the District Court for Eastern Pennsylvania, sought to enjoin the appellees, who are officials of the Commonwealth of Pennsylvania, from attempting to impose and collect an inheritance tax. Diversity of citizenship and an amount in controversy exceeding, exclusive of interest, \$3,000, were averred. The bill sets forth that Thomas B. Clarke, a citizen and resident of the state of New York, died there in 1931 leaving a will under which appellant qualified as executor; that at and before the time of Clarke's death there was on exhibition in Pennsylvania a collection of paintings owned by him, of the estimated market value at the date of his death of \$714,750; that these paintings had been loaned to the Pennsylvania Museum and School of Industrial Art, a non-profit corporation, so that they might be exhibited in the museum of that institution; that the loan was negotiated orally and was for an indeterminate period, but the pictures were to be returned to Clarke at any time upon his request. The bill then quotes the Act of Assembly of Pennsylvania whereby a transfer inheritance tax of a specified percentage of value is laid upon transfers, by will or the intestate laws, of property located within the Commonwealth, from a decedent not a resident of the Commonwealth at the time of his death; describes the procedure for the collection of the tax, namely, that the Department of Revenue, whenever occasion may require, shall appoint an appraiser to appraise the value of the property, if subject to tax; appraisement shall be made after notice to the interested parties; the appraiser shall report his valuation in writing to the Department of Revenue; whereupon that Department is required to give notice to all interested parties, and any person not satisfied with the appraisement may appeal to the Court of Common Pleas of Dauphin County, which may determine all questions of valuation and the liability of the appraised estate for the tax. The bill recites the appointment of an appraiser, who duly notified the appellant of the proposed date of his appraisement; the making of a return, under protest, pursuant to instructions of the appellee Schnader, enumerating as property within the Commonwealth at the decedent's death the seventy-nine portraits in question, and denying taxable situs or taxability of the property in

Pennsylvania; a hearing by the appraiser, who referred the question of taxability to the Department of Justice, of which the appellee Schnader is the head, and pending a decision by him postponed the appraisal indefinitely; and repeated requests for an immediate determination of tax liability, in response to which the appellee Schnader orally advised the appellant its claim of nontaxability in Pennsylvania would be denied. The bill charges that if the statute be construed to impose an inheritance tax upon the paintings merely because they were temporarily within the Commonwealth at the time of the decedent's death, it is unconstitutional as depriving the appellant of property without due process and denying equal protection of the laws, in contravention of the Fourteenth Amendment; and if the statute be construed as not applying to the property, the threatened appraisal, assessment and collection by the defendants will unconstitutionally deprive the appellant of property without due process and deny it equal protection. It further charges that the threat of appraisal, assessment and collection, and the unlawful failure and refusal of the appellee Metzger to issue a waiver of taxes on behalf of the Commonwealth, have caused and are causing irreparable injury by interfering with the administration of the estate in the Surrogate's Court of New York, preventing distribution, compelling the executor to maintain large cash reserves at a low rate of interest to cover a possible Pennsylvania tax and costs of litigation; and also that the threatened tax constitutes a possible lien and a cloud upon the title of the plaintiff, interfering with the sale of the paintings as directed by the will. The bill avers the absence of any adequate remedy at law.

A temporary injunction was issued, an answer was filed admitting the facts stated, and a statutory court of three judges was convened and heard the case on the pleadings and an agreed statement which is immaterial to the questions presented.

The answer asserted, and the court found, that the appellant had an adequate remedy at law, as it could appeal from the appraisal, when made, to the Dauphin County court, which has jurisdiction to pass on both the amount of the tax and the legality of its imposition. The bill was therefore dismissed for want of equity.

1. It is conceded that neither the statutes of Pennsylvania nor the decisions of its courts permit an action at law for the recovery of a tax paid under protest. If that procedure were permissible in the state courts, the appellant could pursue the same remedy in a federal court, there being the requisite diversity of citizenship and amount in controversy. *Matthews v. Rodgers*, 284 U. S. 521. Under the state law the only remedy afforded one who has paid a tax is an application for refund to the Board of Finance and Revenue, an administrative body; but the action upon the claim is final and no court may review or set aside the Board's decision. The District Court, however, was of opinion that the taxpayer's right of appeal from the appraisal to the Court of Common

Pleas of Dauphin County, constituted such a remedy at law as ousted the jurisdiction of a federal court of equity. The Act of Assembly requires the appointment of an appraiser whose duty is to report his appraisal in writing to the Department of Revenue, which must then give immediate notice to all parties interested, and continues: "Any person not satisfied with the appraisal . . . may appeal within thirty days to the court of common pleas of Dauphin County, on paying or giving security to pay all costs together with whatever tax shall be fixed by the court. Upon such appeal, the court may determine all questions of valuation, and the liability of the appraised estate for such tax, subject to the right of appeal to the Supreme or Superior Court."

The appeal must be entered in a state court specifically designated by the statute, and is thus not an ordinary action at law, but a statutory proceeding. The Commonwealth has conditioned the right to implead it, upon resort to a forum of its choice. The taxpayer cannot, therefore, though a non-resident, appeal from the appraisal to a federal court. Moreover, in such cases, upon the perfecting of an appeal, the Commonwealth becomes the adverse party to the litigation in the common pleas court (*Commonwealth v. Taylor*, 29A Dauphin Co. Rep. (Pa.) 102; *Commonwealth v. Taylor*, 32 Dauph. Co. Rep. (Pa.) 207); and this fact would prevent removal of the case from the Dauphin County court to a federal court; Judicial Code, § 24, as amended; 28 U. S. C. § 41 (1); Judicial Code, § 28, as amended; 28 U. S. C. § 71; for the State is not a citizen within the purview of these statutes which define the jurisdiction of the federal courts and permit a removal to them (*Stone v. South Carolina*, 117 U. S. 430; *Postal Telegraph Co. v. Alabama*, 155 U. S. 482; *Arkansas v. Kansas & Texas Coal Co.*, 183 U. S. 185), nor is the controversy one arising under the laws of the United States. *Tennessee v. Union & Planters' Bank*, 152 U. S. 454; *Chicago, R. I. & P. Ry. Co. v. Nebraska*, 251 Fed. 279. As the statutory remedy, if it be treated as an action at law, would lie only in the state court and is not cognizable by the federal courts, either as an original action or by removal, its existence cannot oust federal equity jurisdiction. *Smyth v. Ames*, 169 U. S. 466, 516; *Chicago, B. & Q. R. Co. v. Osborne*, 265 U. S. 14, 16; *Risty v. Chicago, R. I. & P. Ry. Co.*, 270 U. S. 378, 388; *Matthews v. Rodgers*, *supra*, p. 526.

2. Since the Dauphin County court is empowered, upon appeal from the action of the appraiser, to determine all questions, including both valuation and liability for the tax, the contention is made that its function is at least in part administrative, and a suit for injunction may not be entertained by a federal court prior to the decision of the state court. *Prentiss v. Atlantic Coast Line Co.*, 211 U. S. 210; *Porter v. Investors Syndicate*, 286 U. S. 461. The statutes under consideration in those cases delegated legislative power of regulation to an administrative body and vested a revisory power in a court. As has repeatedly been

held, the action of the court in such a matter is legislative rather than judicial, so that one who has not pursued the legislative process to a conclusion cannot turn to a court of equity for relief from a regulatory order which is not the final word of the constituted state authority. But other decisions make it clear that, while the action of the appraiser in a case like the present is purely administrative, the function of the court upon appeal is judicial in character, if, when the case is brought into the court, the Commonwealth becomes plaintiff and the taxpayer defendant, and the action is tried as an ordinary action, resulting in a judgment, which is final and binding on the parties, subject only to appeal to a higher state court, as permitted by the Act. This renders the proceeding judicial, and gives it the character of a suit or action at law.

[The court then proceeded to discuss a number of similar cases in which a like conclusion had been reached.]

If the Dauphin County court were by the act of Assembly granted only the right to revise the valuation of the appraiser, and precluded from considering any other question, its proceedings would be purely administrative, and the contention that the appellant had failed to pursue to the end its administrative remedy would be sound (*Upshur County v. Rich*, 135 U. S. 467), at all events where the valuation is a subject of controversy.

The court below relied upon *Keokuk & Hamilton Bridge Co. v. Salm*, 258 U. S. 122, where a bill to enjoin collection of a state tax was held to lack equity. That case is, however, distinguished by the fact that before resorting to any court the taxpayer could have appealed to the board of review to correct the assessment of which he complained, and the record failed to show that he had pursued the administrative remedy so afforded him (p. 125).

The Acts of Assembly of Pennsylvania direct the Department of Revenue to collect, and the Attorney General to bring suit for, the amount of the tax, if it is not paid within one year of assessment. If, therefore, the appellant should omit to take an appeal to the Dauphin County common pleas court, the assessment would become final and the appellant liable to suit for the amount of the tax. As the Commonwealth is the plaintiff in the action, the cause could not be removed, for reasons already stated.

We are of opinion that upon the making of the appraisement the administrative procedure is at an end, and the appellant can thereafter resort to a federal court of equity to restrain further action by the state officers if in violation of constitutional rights.

3. The question, then, is whether the bill was prematurely filed. In view of what has been said, the appellant's cause of action in equity will not, strictly speaking, arise until an appraisement is made and certified to the Department of Revenue and notice of the fact is given

appellant. However, in view of the allegations of the bill, we are not inclined to hold the suit premature. The bill charges that the Secretary of Revenue has refused to issue a waiver of tax, and that the Attorney General has notified the appellant and the State's appraiser the property is subject to the tax, and the appellant's claim for exemption will be denied. The Commonwealth's law officers plainly intend to perform what they consider their duty, and will, unless restrained, cause the assessment and imposition of the tax. The action the legality of which is challenged thus appears sufficiently imminent and certain to justify the intervention of a court of equity. Compare *Pennsylvania v. West Virginia*, 262 U. S. 553, 592. Moreover, no purpose would be served by dismissing the bill, if as we hold, the moment the proposed assessment is made another suit may be instituted in the federal court.

The decree of the District Court is reversed and the cause remanded with instructions to reinstate the bill and proceed to a hearing upon the merits.

Reversed.<sup>17</sup>

**Oklahoma Natural Gas Co. v. Russell, Supreme Court of the United States, 1923. 261 U. S. 290, 67 L. Ed. 659, 43 S. Ct. 353.**

Appeals from orders of the District Court denying applications for preliminary injunctions to restrain the enforcement of state orders fixing the rates of the appellant gas companies.

MR. JUSTICE HOLMES delivered the opinion of the court.

These two cases were argued separately, but they turn on the same point, were decided in a single opinion by the court below and do not require a separate consideration here. The plaintiffs are corporations organized under the laws of Oklahoma and furnish natural gas to consumers in that State, at rates established by the Corporation Commission. They applied to the Commission for higher rates but were denied an advance. The Constitution of Oklahoma, admitted to be like that of Virginia dealt with in *Prentis v. Atlantic Coast Line Co.*, 211 U. S. 210, gives an appeal to the Supreme Court of the State, acting in a legislative capacity as explained in the case cited, with power to substitute a different order and to grant a supersedeas in the meantime. Appeals were taken to the Supreme Court and supersedeas was applied for but refused. The appeals are still not decided. After the plaintiffs had been denied a supersedeas by the Supreme Court, they filed these bills alleging that the present rates are confiscatory, setting

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<sup>17</sup> Apparently the certainty of a ruling by the Commission adverse to the utility does not always alter the necessity for observing comity. It has been held that an application for federal injunction may be held premature even though the members of the Commission have unofficially announced that they intend to enter an adverse order. *Gilchrist v. Interborough Rapid Transit Co.*, 279 U. S. 159, 73 L. Ed. 652, 49 S. Ct. 282 (1929). See also *Wisconsin-Minnesota Light & Power Co. v. Railroad Commission of Wisconsin*, 267 Fed. 711 (1920).



up their constitutional rights and asking preliminary injunctions, and permanent injunctions unless the Supreme Court should allow adequate rates. Applications for temporary injunctions supported by evidence were heard by three judges but were denied by the majority on the authority of the Prentis case. Appeals were taken directly to this court.

A doubt has been suggested whether these cases are within section 266 of the Judicial Code, Act of March 3, 1911, c. 231, 36 Stat. 1087, 1162, as amended by the Act of March 4, 1913, c. 160, 37 Stat. 1013. The section originally forbade interlocutory injunctions restraining the action of state officers in the enforcement or execution of any statute of a State, upon the ground of its unconstitutionality, without a hearing by three judges. The amendment inserted after the words "enforcement or execution of such statute" the words "or in the enforcement or execution of an order made by an administrative board or commission acting under and pursuant to the statutes of such State" but did not change the statement of the ground, which still reads "the unconstitutionality of such statute." So if the section is construed with narrow precision it may be argued that the unconstitutionality of the order is not enough. But this Court has assumed repeatedly that the section was to be taken more broadly. *Louisville & Nashville R. R. Co. v. Finn*, 235 U. S. 601; *Phoenix Ry. Co. v. Geary*, 239 U. S. 277; *Cumberland Telephone & Telegraph Co. v. Louisiana Public Service Commission*, 260 U. S. 212; *Western & Atlantic Railroad v. Railroad Commission of Georgia*, 261 U. S. 264, ante. The amendment seems to have been introduced to prevent any question that such orders were within the section. It was superfluous, as the original statute covered them. *Louisville & Nashville R. R. Co. v. Garrett*, 231 U. S. 298, 301; *Atlantic Coast Line R. R. Co. v. Goldsboro*, 232 U. S. 548; *Grand Trunk Western Ry. Co. v. Railroad Commission of Indiana*, 221 U. S. 400. But it plainly was intended to enlarge, not to restrict the law. We mention the matter simply to put doubts to rest.

Coming to the principal question, if the plaintiffs respectively can make out their case, as must be assumed for present purposes, they are suffering daily from confiscation under the rate to which they now are limited. They have done all that they can under the state law to get relief and cannot get it. If the Supreme Court of the State hereafter shall change the rate, even *nunc pro tunc*, the plaintiffs will have no adequate remedy for what they may have lost before the Court shall have acted. *Springfield Gas & Electric Co. v. Barker* (D. C.) 231 Fed. 331, 335. In such a state of facts *Prentis v. Atlantic Coast Line Co.* has no application. See *Love v. Atchison, T. & S. F. Ry. Co.*, 185 Fed. 321, 324, 325. Rules of comity or convenience must give way to constitutional rights. In the case cited there was no doubt as to the jurisdiction of the Circuit Court but simply a decision that the bills should be retained to await the result of appeals if the companies saw

fit to take them. 211 U. S. 232. The companies had made no effort to secure a revision and there had been no present invasion upon their rights, but only the taking of preliminary steps toward cutting them down. In such circumstances it was thought to be more reasonable and proper to await further action on the part of the state.

As in our opinion the District Court had jurisdiction and a duty to try the question whether preliminary injunctions should issue, and as that question has not yet been considered, the cases should be remanded to that court with directions to proceed to the trial. Generally it is not desirable that we should pass upon such matters until they have been dealt with below. *Lutcher & Moore Lumber Co. v. Knight*, 217 U. S. 257; *Brown v. Fletcher*, 237 U. S. 583.

Decrees reversed and cases remanded for further proceedings consistent with this opinion.<sup>18</sup>

**Smith v. Illinois Bell Telephone Co., Supreme Court of the United States, 1926. 270 U. S. 587, 70 L. Ed. 747, 46 S. Ct. 408.**

MR. JUSTICE SUTHERLAND delivered the opinion of the court.

The telephone company, an Illinois corporation, owns and operates a telephone system in the City of Peoria and vicinity. It brought suit on June 18, 1924, against appellants (members of the state Commerce Commission and Attorney General of the State of Illinois) to enjoin them from enforcing or attempting to enforce a schedule of rates alleged to be confiscatory, and from taking any steps or proceedings against the company by reason of the collection by it of rates and charges under another and higher schedule. A motion to dismiss the bill was overruled; and, upon the bill and attached exhibits and affidavits, appellants refusing to plead further, a permanent injunction in accordance with the prayer was granted by the lower court. The appeal in No. 670 is from that decree.

The appeal in No. 193 is from an order, previously entered, granting an interlocutory injunction. A motion to dismiss that appeal on the ground that the order for the interlocutory injunction had become merged in the final decree, was submitted but consideration postponed to the hearing on the merits. The motion is now granted and the appeal in No. 193 dismissed. *Shaffer v. Carter*, 252 U. S. 37, 44; *Pacific Tel. Co. v. Kuykendall*, 265 U. S. 196, 205. In the cases cited, both interlocutory and permanent injunctions had been denied; here they were granted; but the record discloses no reason which prevents the same principle from being applicable.

The averments of the bill, which, upon this record, must be taken as true, disclose the following facts: The operations of the company were

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<sup>18</sup> Refer to Smith, "Judicial Function in Legislative Bodies," 27 Va. L. Rev. 417 (1941), for an attack on the restrictive doctrines of judicial review manifested in the *Prentis* and similar cases.

conducted with reasonable economy. For the year 1921, the net revenues, after payment of operating expenses and taxes, were, in round figures, \$46,000; for the year 1922 there was a deficit of over \$48,000; for 1923, a deficit of nearly \$65,000; and a deficit for each month of the year 1924 preceding the filing of the bill. The fair value of the property, including working capital, material and supplies, and going value, was at least \$3,800,000.

In July, 1919, the predecessor in ownership of the company filed with the commissioner a schedule of rates covering the telephone service in question, which the commission, by final order after a hearing, approved. Prior to that order, however, the predecessor of the company had filed with the commission a second schedule of increased rates, to become effective May 1, 1920. The commission first suspended the effective date of this schedule until August 29, 1920; and then, by successive orders, until February 26, 1921, August 26, 1921, and February 23, 1922. The present company, in December, 1920, succeeded to the property and rights of its predecessor.

During 1920, hearings were had before the commission in respect of the justice and reasonableness of the rates proposed by the second schedule, but no determination of the matter was reached. The commission, although often requested by the company to do so, thereafter failed and refused to hold further hearings, but on October 31, 1921, entered an order purporting permanently to suspend, cancel and annul the second schedule. A rehearing was applied for and denied.

Thereupon, an appeal was prosecuted to the Circuit Court of Peoria County; and that court, on April 6, 1922, reversed the commission's order and remanded the cause for further proceedings. The commission redocketed the cause and had hearings in June, July and September, 1922, after which the company filed its written motion requesting the commission to make effective a temporary schedule of rates pending a final determination. This motion was denied on September 28, 1922. On July 5, 1923, the company called attention to the delay in the determination of the cause, and to the fact that the revenues derived from the operation of the Peoria exchange fell short of meeting its operating expenses, and requested the commission to set the cause for an early hearing. This request was ignored; and the commission ever since has failed and refused to determine the issues in the cause or to determine whether the rates and charges provided in the second schedule are just and reasonable; but has continued in effect the rates and charges contained in the first schedule approved by it. These rates not only do not yield a fair return, but are insufficient to pay the operating cost of rendering telephone service to the subscribers and patrons of the exchange. Finally, it is alleged that the company is deprived of its property without due process of law and is denied the equal protection of the law, in violation of the Fourteenth Amendment to the federal Constitution.

This conclusion, which necessarily results from the facts, is not seriously challenged, but a reversal of the decree below is sought on the ground that the company, prior to filing its bill, had not exhausted its legislative remedies. The argument seems to be that the second proposed schedule of rates, filed while the first was pending, purported to cancel the first schedule; that the order putting into force the rates in the first schedule was in effect a finding against the second and put an end to it; that no legal application for an increase of rates has since been made; therefore, when the suit was brought, nothing was before the commission upon which that body could lawfully act. The short answer is that the commission, after disposing of the first schedule, had uniformly treated the second as pending; had held hearings and made interlocutory orders in respect of it; had entered an order for its permanent suspension; after reversal by the state court on appeal, by which tribunal it was regarded as properly pending, had restored it to the docket for further proceedings; and had held further hearings. To say now that all this shall go for naught and that the company must institute another and distinct proceeding, would be to put aside substance for needless ceremony.

It thus appears that, following the decree of the state court reversing the permanent order in respect of the second schedule and directing further proceedings, the commission for a period of two years, remained practically dormant; and nothing in the circumstances suggests that it had any intention of going further with the matter. For this apparent neglect on the part of the commission, no reason or excuse has been given; and it is just to say that, without explanation, its conduct evinces an entire lack of that acute appreciation of justice which should characterize a tribunal charged with the delicate and important duty of regulating the rates of a public utility with fairness to its patrons but with a hand quick to preserve it from confiscation. Property may be as effectively taken by long-continued and unreasonable delay in putting an end to confiscatory rates as by an express affirmation of them; and where, in that respect, such a state of facts is disclosed as we have here, the injured public service company is not required indefinitely to await a decision of the rate-making tribunal before applying to a federal court for equitable relief. The facts, which the motion to dismiss conceded, present a far stronger case for such relief than any of the cases with which this court dealt in *Okla. Gas. Co. v. Russell*, 261 U. S. 290, 293; *Prendergast v. N. Y. Tel. Co.*, 262 U. S. 43, 49; *Pacific Tel. Co. v. Kuykendall*, *supra*, p. 204; and *Banton v. Belt Line Ry.*, 268 U. S. 413, 415.

Some complaint is made to the effect that the decree attempts to bind persons not parties to the suit, including thousands of subscribers, and to prohibit appellants from enforcing in the future any legislative remedy for excessive charges, hereafter imposed, however unreasonable

they may be. As to the first branch of the complaint, it is only necessary to say that the commission represents the public and especially the subscribers, and they are properly bound by the decree. In *re Engelhard*, 231 U. S. 646, 651. As to the other objection, there is nothing in the decree, rightly construed, which attempts to curtail or could curtail the legislative or rate-making powers of appellants to proceed hereafter under the state law, subject to such limitations, if any, as may be required by the doctrines of *res judicata*, ordinarily applicable in such cases.

Decree affirmed.<sup>19</sup>

**Phipps v. School Dist. of Pittsburgh, Circuit Court of Appeals, Third Circuit, 1940. 111 F. (2d) 393.**

JONES, Circuit Judge.

This appeal calls in question the action of the district court in declining to take jurisdiction of the plaintiffs' suit which sought to enjoin the School District of Pittsburgh and its representatives from levying and collecting certain taxes for specified years.

The bill of complaint assails the school district's tax levies for the years 1937, 1938 and 1939 on the ground of the alleged unconstitutionality of the statutes under which the taxes for those years were imposed by the Board of Public Education of the school district. As the bill specifically avers, the taxes for 1937 and 1938 were imposed by the school board "under the purported authority" of § 524 of the Act of May 18, 1911, P. L. 309, commonly known as the School Code. . . . and the taxes for 1939 were imposed "under the purported authority" of § 524 of the School Code. . . .

The court below concluded that the plaintiffs' action was a suit to enjoin and restrain the levy and collection of taxes imposed by or pursuant to the laws of Pennsylvania and that a plain, speedy and efficient remedy may be had in equity in the courts of that state. Accordingly, the court dismissed the bill for want of jurisdiction because of the prohibition contained in § 24 (1) of the Judicial Code as amended by the Act of August 21, 1937. From the judgment of dismissal, the plaintiffs took the present appeal.

As the result of an attack made in the state courts in the fall of 1937 by taxpayers of the School District of Philadelphia, the Supreme Court of the state declared the amendment of 1929 to § 524 of the School Code unconstitutional (*Wilson et ux. v. Philadelphia School District*,

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<sup>19</sup> For law review discussion of the doctrine of exhaustion of administrative remedies, see Berger, "Exhaustion of Administrative Remedies," 48 Yale L. Jour. 981 (1939), and for an extended examination of both the prior resort and exhaustion doctrines, see McAllister, "Statutory Roads to Review of Federal Administrative Orders," 28 Calif. L. Rev. 129 (1940).

328 Pa. 225, 195 A. 90, 113 A. L. R. 1401) but withheld injunctive relief from the complainants because of their laches and retained "the record and jurisdiction of the case for such further action as, on proper application, may be shown to be necessary." Thereupon, a suit on similar grounds was instituted by a taxpayer against the School District of Pittsburgh (*Brooks v. School District of Pittsburgh*, not reported) which terminated in a like ruling and decree by the State Supreme Court.

Following these decisions, the state legislature, in special session, enacted the statute of September 16, 1938, P. L. 36, purporting to validate and confirm all taxes theretofore levied and assessed by the board of public education in any school district of the first class. The legislature also enacted the further amendment of § 524 of the School Code (being the Act of December 1, 1938, *supra*), endeavoring to avoid the defect for which the amendment of 1929 had been held unconstitutional. It was subsequent to the passage of these two acts that the appellants filed their suit in the court below.

The appellants argue that, since the Supreme Court of the state held the amendment of 1929 unconstitutional, there never was a law of the state by or pursuant to which the taxes for 1937 and 1938 could have been imposed and that since the state court upon declaring the act of 1929 unconstitutional withheld injunctive relief from the complainants in the *Wilson* and *Brooks* cases, *supra*, because of their laches, the remedy in equity open to the present appellants in the state courts would be inefficient. Neither of these contentions can be sustained.

While it is clear that the appellants are without a remedy at law in the state courts, it is equally clear that equity has jurisdiction in Pennsylvania to enjoin the collection of taxes which have been levied or assessed without authority of law. That jurisdiction has been invoked by taxpayers and exercised by the courts of the state many times. . . .

But, the appellants contend that the remedy in equity available to them in the state courts is not "plain, speedy, and efficient," assigning as the reason for their contention that the State Supreme Court, while declaring the act of 1929 unconstitutional in the *Wilson* and *Brooks* cases, *supra*, withheld injunctive relief from the complainants. That was done, however, not because the court was without power to issue an injunction, but because the complainants, by having permitted the school district's taxing power to go unquestioned for years, during which time large sums of money had been collected and expended from tax levies under the challenged statute for the maintenance and operation of the public school system of the district, had thereby waived their right to summary relief by way of an injunction. As the court pointed out, to grant the complainants injunctive relief would, of itself, be inequitable. It would favor the delinquents to the detriment of those who had paid

timely for there are no legal means for the recovery of taxes already paid. See *Wilson et ux. v. Philadelphia School District et al.*, *supra*, and cases cited ante.

The efficiency of the remedy is not to be measured by the limitations upon the relief allowable to a particular complainant who has been guilty of laches. The requirement of the amendment to the Judicial Code of August 21, 1937, relates to the remedy generally in the state courts; and, the test of the efficiency of the remedy in equity is whether the state court's jurisdiction is competent for a hearing of the complaint on its merits and the final disposition of the matter by the entry of a decree adequate to the rights of the parties, with power in the court to protect its jurisdiction and to enforce its decrees by writs of injunction or other process. Such is the extent of the remedy in equity in Pennsylvania with respect to the restraint of the collection of taxes illegally levied or assessed. . . .

. . . .  
The purpose of the amendment of August 21, 1937, and of the Johnson Act, was to prevent federal court interference with the fiscal affairs of a state in the one instance and the exercise by a state of its regulatory power over public service companies in the other where complaint against state action in either regard could be litigated in the courts of the state. And, the cases where district courts have declined to take jurisdiction either because of the amendment of August 21, 1937, or the Johnson Act plainly indicate that these provisions of the Judicial Code are to be faithfully observed in effectuation of their intended purpose and that jurisdiction of suits of the character specified in the amendment of August 21, 1937, or in the Johnson Act may be taken by district courts only where it is evident that a plain, speedy and efficient remedy may not be had in the state courts. . . .

. . . .  
The present case falls peculiarly within the inhibition contained in the Judicial Code as amended by the Act of August 21, 1937, and the court below therefore properly dismissed the bill of complaint for want of jurisdiction.

## CHAPTER IX

### EXTENT OF CONTROL OF ADMINISTRATIVE ACTION BY THE COURTS

#### SECTION 1. SCOPE OF REVIEW IN VARIOUS TYPES OF CASES

##### Workmen's Compensation

**Ginsberg v. Burroughs Adding Machine Co., Supreme Court of Michigan, 1918. 204 Mich. 130, 170 N. W. 15.**

Plaintiff's husband, the decedent, was in the employ of the defendant on June 6, 1917. He and others were unloading boxes of steel from box cars. The boxes of steel were about 1½ feet square and from 6½ to 7 feet long. They weighed from 400 to 800 pounds. They were loaded in the ends of the car. The other workmen employed with decedent were named Trzienski and Schacht. The manner of conducting the work in hand was that Trzienski and Schacht with iron hooks, similar to ice tongs, would take down the boxes from their places in the car; with the aid of a roller, consisting of a two-inch gas pipe, they would be conveyed to the door; there decedent would attach a similar hook which was connected with rope and pulley; he would put the hooks or tongs in the center of the boxes and they would be lifted by the operation of the rope and pulley and slid out of the car. Schacht was not called as a witness, but Trzienski was. He testified that in the afternoon of the day in question he was trying to raise a box which he estimates would weigh about 600 pounds; decedent was ready to put the roller under it; that he was unable to lift it high enough to get the roller under it, and it slipped and grated decedent's toe. He also says that he lifted the box off decedent's toe and that the box did not hit decedent on his legs or body any place. There was testimony that thereafter decedent limped and was given other work to do. The straw boss learned of this accident and at supper time decedent took off his shoe and stocking and the straw boss looked at his foot; there was a little redness to the little toe and the one next to it, but no other evidence of an injury; decedent worked overtime until half past eight. When he arrived home about nine o'clock he was limping; he washed and had his supper, but was unable to get up from the table and had to be assisted to bed. Upon his clothing being removed it was found that



the toes on his left foot were red, but they were not mashed; there was also a redness on his right leg, about four or five inches above the knee. He complained more about the leg than he did the toes. Over the objection of the defendant the plaintiff was permitted to introduce evidence of statements of decedent made at this time, and at later dates as to how the accident happened—that a box of steel fell on his right leg. We shall have occasion to presently refer to this testimony and will not now further detail it. The testimony also shows that decedent had always before this been a strong, healthy man, had never been sick. He did not return to work. It does not appear that there was any serious trouble with the toes but the condition of the leg grew serious and plaintiff called a doctor. Later a doctor employed by defendant also called on him. The doctor produced by plaintiff and the one produced by defendant do not disagree upon any material element of the case. From the medical testimony it appears that the condition of decedent's leg resulted in a thrombosis or stoppage of the saphenous vein in the thigh by a blood clot, necessitating the removal of a section of that vein on June 20th; that he suffered a relapse on June 27th, and died the following day; that death was due to the lodgment of a blood clot in the vessels of the intestines; that the blood clot undoubtedly came from the condition originally developed in the saphenous vein; that the condition of the toe had nothing to do with it; and that the condition of the saphenous vein might have been produced either by a blow or infection from bacteria in the system. The industrial accident board found that deceased was struck in the right leg by the box of steel, receiving an accidental personal injury to his right thigh; that such injury was the proximate cause of his death and affirmed the award of the committee of arbitration awarding plaintiff \$8.27 per week for a period of 300 weeks. To review this award of the board, this writ was allowed.

FELLOWS, J. (after stating the facts). As the board has found that the deceased was injured as stated by him at various times after the accident, and as much of this hearsay testimony is quoted at length in the opinion, and as the board has expressly held that at least some of it was admissible, we will first consider the question of whether statements of the deceased as to how the accident happened, made after the happening of the event, are admissible.

In the case of *Reck v. Whittlesberger*, 181 Mich. 463, we had the question of hearsay evidence before us and it was there said:

"The rule against hearsay evidence is more than a mere artificial technicality of law. It is founded on the experience, common knowledge, and common conduct of mankind. Its principles are generally understood and acted upon in any important business transaction or serious affair in life. In such matters men refuse to rely on rumor or what

some one has heard others say, and demand the information at first hand." . . .

The board held that the statements of deceased made to Dr. McDonnell as to the happening of the accident were competent evidence and bound the defendant. They were put into the case not for the purpose of showing notice of the injury, but as substantive evidence of the facts of the injury. It is argued in support of this holding that Dr. McDonnell was the agent of the defendant, made a report to the company, which however is not in the record, and therefore not before us; and that decedent's claim as to how the accident happened is evidence that it did so happen, and *Reck v. Whittlesberger*, supra, and *Fitzgerald v. Lozier Motor Co.*, 187 Mich. 660, are cited to support this holding. In the instant case Dr. McDonnell was not a regularly retained physician of the defendant. He and other doctors were called to treat employees of defendant as occasion might arise; he was called upon to administer to employees, but not to represent the defendant in any way. It is apparent that the board has misconceived the holding of this court in these two cases. In the *Reck Case*, the employer reported to the board the cause and manner of the accident being that deceased was throwing wood in the furnace and a nail inflicted a gash in his hand. We there said:

"We think that such reports from the employer where all sources of information are at his command when the reports are made, and he has had ample opportunity to satisfy himself of the facts, can properly be taken as an admission, and, at least, as *prima facie* evidence that such accident and injury occurred as reported."

It must be patent that the employer or the officer of a manufacturing company, who makes the report to the board, rarely, if ever, witnesses the accident. He obtains his information from others. It comes to him second-hand. If, after making his investigation, he concludes that the accident happened in a certain way and so reports, it may be regarded as an admission, and therefore, some evidence before the board for its consideration. This was the situation in the *Reck Case* and this was the holding.

In the *Fitzgerald Case*, the foreman, whose duty it was to report accidents to his superior, reported that deceased scratched his right hand on manifold on top of the thumb joint. He had received his information from the injured employee. But he was the authorized agent of the company to investigate and make such report; by adopting the claim of the employee as his own report and version of the accident, the employee's claim became and was his report. Following the *Reck Case*, it was held receivable as an admission and together with other evidence was held to be sufficient to support the finding.

These two cases hold that where the employer or his authorized agent, whose duty it is to make report of accidents, who have the opportunity

to investigate, makes a report as to the accident, such report is receivable as an admission, and as an admission may be sufficient to establish a *prima facie* case. It is unimportant how the employer procures his information. It may all be hearsay. It may come through several hands, from different sources; but when he or his authorized agent reports that the accident happened in a certain way, the report stating that it happened in that way is an admission and receivable as such. These cases go no farther. They do not make the claim of the injured employee as to how the accident happened evidence of the facts. It is only by the adoption of that claim by the employer or his authorized agent that it becomes an admission and receivable as such. In the instant case we have no such report, nor was Dr. McDonnell the agent of defendant for the purpose of making such report. The board was in error in holding that such hearsay evidence was receivable as competent evidence of the facts.

But we should not reverse the case for the admission of incompetent hearsay evidence. If there is competent evidence to sustain the finding, the case should be affirmed. *Reck v. Whittlesberger*, supra. In the consideration of these cases the rules which govern are well recognized. The burden of establishing a claim for compensation rests on those seeking the award. They are not required to establish their case by positive, direct evidence; in many cases that would be impossible; they may prove their case by circumstantial evidence as other cases are established. The board is the trier of the facts, and weighs and measures the conflicting testimony, medical as well as lay. *Deem v. Kalamazoo Paper Co.*, 189 Mich. 665; *Perdew v. Nufer Cedar Co.*, 201 Mich. 520. It is the province of the board to draw the legitimate inferences from the established facts and to weigh the probabilities from such established facts. *Wilson v. Phoenix Furniture Co.*, 201 Mich. 531. But the inferences drawn must be from established facts; inference may not be built upon inference, possibilities upon possibilities, or inferences drawn contrary to the established facts, contrary to the undisputed evidence. If an inference favorable to the applicant can only be arrived at by conjecture or speculation the applicant may not recover. So if there are two or more inferences equally consistent with the facts, arising out of the established facts, the applicant must fail. *McCoy v. Michigan Screw Co.*, 180 Mich. 454; *Draper v. Regents of University*, 195 Mich. 449; *Albaugh-Dover Co. v. Industrial Board*, 278 Ill. 179 (115 N. E. 834); *Curran v. Newark Gear Co.*, 37 N. J. L. J. 21; *Savoy Hotel Co. v. Industrial Board*, 279 Ill. 329 (116 N. E. 712); *Sanderson's Case*, 224 Mass. 558 (113 N. E. 355); *Carroll v. Knickerbocker Ice Co.*, supra; *Burwash v. F. Leyland & Co.*, 5 B. W. C. C. 663.

In the instant case the only witness produced who saw the accident on June 6th testified that the only part of the body of deceased struck by the box was his toes. There is nothing inconsistent or improbable

about his testimony. It is in no way discredited save by the statements of the deceased, which were hearsay and improperly received in evidence. It is undisputed upon this record. No other witness testified in conflict with it, and the established facts are not inconsistent with it. Nor is the opinion evidence of the doctors inconsistent with it. As we have stated they were not out of accord. Their testimony clearly puts the cause of death without the pale of inferences and within the sphere of speculation and conjecture. . . .

We therefore conclude that the testimony of the statements of the deceased as to the happening of an accident to his thigh was hearsay; that it should not have been received or considered; that without it there is no evidence in the record in conflict with the testimony of the witness Trzienski; that there is no competent evidence to sustain the findings of the board and that the award should be vacated.

OSTRANDER, C. J., and STEERE, BROOKE, and STONE, JJ., concurred with FELLOWS, J.

MOORE, J. (dissenting). I think there was testimony upon which to base the finding of the industrial commission and that the case should be affirmed.

BIRD and KUHN, JJ., concurred with MOORE, J.<sup>1</sup>

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<sup>1</sup> The Michigan Supreme Court, like most other courts, has made it abundantly clear, that it will not weigh the testimony in compensation cases on issues of fact submitted to the commission for decision. The statutory provisions restricting judicial review in this regard are faithfully observed. "We do not hear this kind of case *de novo*, and cannot pass on the weight of the evidence. If the finding is supported by competent evidence, then it cannot be disturbed." *Martilla v. Quincy Min. Co.*, 221 Mich. 525, 191 N. W. 193 (1923).

Michigan has a so-called "elective" compensation act. However, similar results are reached under the compulsory type of act. See Wible, "Due Process of Law and Administrative Finality in Awards Made Under Workmen's Compensation Acts," 4 Wis. L. Rev. 236 (1927).

For a general survey of the case law, see "Workmen's Compensation: Review of Facts Found by Industrial Commissions," 14 Cornell L. Q. 250 (1929).

Many courts assimilate the commission award to the jury verdict and treat it accordingly. The approach of the Colorado Supreme Court in *Industrial Commission v. Elkas*, 73 Colo. 745, 216 Pac. 521 (1923) is not uncommon. Said the court:

"Is the district court, under the Workmen's Compensation Act to treat the award like the verdict of a jury, not to be set aside where there is legal evidence to support the finding but to be set aside where there is not such evidence?"

"Suppose the commission should make an award with no evidence. Certainly we could not let it stand any more than if it were a verdict. Suppose it were made on evidence so weak that it would amount to no evidence. The answer must be the same.

"We, in this court, in matters of this kind, are permitted to consider only questions of law, but it is familiar that the question whether the verdict is supported by evidence is a question of law and the same must be true of an award. . . ."

**Papinaw v. Grand Trunk Ry. Co. of Canada, Supreme Court of Michigan, 1915. 189 Mich. 441, 155 N. W. 545.**

Proceeding by Rose Papinaw against the Grand Trunk Railway Company under the Workmen's Compensation Act for compensation for the death of her husband. Compensation was awarded by the Industrial Accident Board and the defendant brings certiorari.

STEERE, J. The husband of applicant, Alfred Papinaw, who had been for several years section foreman for respondent, was killed during the night of January 30, 1914, on its track between his residence and what is called the Tunnel depot of respondent's road in the city of Port Huron. On her application for compensation under Act No. 10, Pub. Acts 1912 (extra session), the Michigan Industrial Accident Board found that his death arose out of and in the course of his employment, and therefore awarded her the full compensation provided in such cases.

The known facts and circumstances relating to Papinaw's death are practically undisputed. Respondent contends that the award was erroneous because it cannot fairly be found as a matter of fact, from any competent evidence in the case, that his death did so arise.

Deceased's section commenced at what is known as Tappan Junction, which was about  $1\frac{3}{4}$  miles west of the Tunnel depot, and extended several miles westerly toward Detroit. He resided with his family near the east end of his section, about 150 feet north of respondent's tracks, on the west side of the Junction road which runs north and south, crossing respondent's tracks a short distance east of Tappan Junction. His daily duties as section foreman required him usually to work upon the track with his section crew from about 7 o'clock in the morning until 5:30 in the evening, the time varying somewhat with the season of the year. It was also his duty to patrol the track Sunday mornings and

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In *Employers' Mutual Ins. Co. v. Industrial Commission*, 83 Colo. 315, 265 Pac. 99 (1928), the Colorado court was confronted with an interesting situation. The question involved was whether or not the claimant under the Workmen's Compensation Act was permanently disabled. Eight physicians testified that claimant could go back to work. One testified that he was permanently disabled. The commission concluded that there was permanent disability. Review was sought on the ground that the commission had exceeded its powers. The court affirmed the award saying, "We cannot say that there is no evidence, or that 'the evidence is so weak that it amounts to no evidence.' . . . The case presented is one in which doubt arises purely on the weight of evidence and we cannot, without violation of the statute, reverse it."

The Colorado Workmen's Compensation Statute (Laws 1919, § 103, p. 743) provides:

"The court may affirm or set aside such order or award; but only upon the following grounds:

- (a) That the commission acted without or in excess of its powers;
- (b) That the finding, order or award was procured by fraud;
- (c) That the findings of fact by the commission do not support the award."

keep a yard interlocking light burning at night, and relight it in case it went out during the night. Between his section and the Tunnel depot was another section in charge of a different foreman, called the Tunnel freight-yard section. In this section were numerous switches, five of which near the Tappan Junction road crossing it was the duty of deceased to look after in case of storm. It was his custom when nothing out of the ordinary arose, and there was no indication of storm, to retire early. He was subject to be called out at any time of night in case of a wreck or to clean the switches in event a storm rendered it necessary. Another of his duties was to keep the time of his crew and daily enter it on a time book from which he made out their check pay rolls at his home as opportunity arose, and mailed them at the Tunnel depot to respondent's superintendent in Detroit. This was required to be done for the first half of each month in time to reach the Detroit office not later than the morning of the 14th, and for the last half not later than the first day of the ensuing month. The section hands worked by the day with extra pay for overtime, but section foremen were then paid monthly wages of \$62.50, which covered whatever services they rendered during the month, and were required to be on call at all times. If they wished to be away beyond call over night or on Sunday they had to secure permission from the roadmaster, while the section hands were at liberty to go and come as they pleased on nights and Sundays.

There was a street, called Griswold, running east and west on the north side of respondent's tracks, but not parallel with them, at a distance of about 4 blocks from the Tunnel depot and about  $2\frac{1}{2}$  blocks from respondent's west-bound track at the Junction road near where deceased resided. This was outside of the city limits, similar to a country road. The railroad men, including deceased, who resided near Tappan Junction, were accustomed to use the railroad tracks in going to and returning from the Tunnel depot, it being more convenient and direct than by the street.

Deceased's education was limited and it was hard for him to correctly prepare his pay rolls and reports. He worked at this task the evening before until midnight, and on the afternoon of January 30th, at about half past 3, returned home to complete making them out, which he practically finished about supper time. After supper he signed the papers and his wife addressed the envelopes containing them. He then left home, about 6:30 o'clock, for the purpose of mailing them at the Tunnel depot, as was customary and in accordance with his instructions, that they might be received in Detroit the next day. There is no direct evidence of his movements from that time. These papers were mailed that evening at the Tunnel depot and went out on a train which left at 6:55, being received in Detroit the following day. Some time about midnight his remains were found by a switchman on respondent's tracks, badly mutilated and cut to pieces, portions being scattered along

and frozen to the track, at a locality variously stated as from about a block and a half east of Tappan Junction to 1,300 feet east of the Junction road. It was a dark, stormy night with a mixture of rain and snow flying and falling. His wife testified that he seldom went to the city at night and never to the tunnel except on the nights when it was his duty to mail his pay rolls and reports; that on leaving this night he commented upon its being dark and stormy, telling her that if he was late she could know that he was out working on the switches.

Between when deceased left home and his remains were discovered, the time of his death is necessarily indefinite. The undertaker who was summoned shortly after their discovery and cared for the remains testified that they were strung along the track 75 or 100 feet, some parts frozen to the rails or ties so that he had difficulty in loosening them; that it was a "cold, nasty, raw night," and he thought from the condition of the body, which he judged had been dead an hour and a half or two hours, that more than one train ran over him; that "one had taken him one way and another brought him back."

In considering this case we start with the well-settled proposition that if the facts proven are capable as a matter of law of sustaining the inferences of fact drawn from them by the Industrial Accident Board, its findings are conclusive, in the absence of fraud, and the appellate court is not at liberty to interfere with them. Section 12, part 3, of the Industrial Accident Law has been too often and recently so construed by this court to require citation of cases. This is but an application under the statute of the comprehensive and fundamental principle universal in courts of law, that whether there is any competent evidence is for the court to determine, but whether the evidence is sufficient is a question for the jury, the function of the accident board being in that respect those of a jury in actions at law.

This case is readily distinguishable from that line of decisions cited by respondent in which the employee by his contract of hiring was engaged to work during certain hours, and was injured away from his place of employment, while going to or returning from work, or was absent during some intermission for meals, or otherwise, not then upon his employer's business nor subject to his control, at liberty for the time to go where and do what he pleased, free from any claim of the employer upon his services. Here it is shown conclusively that by his contract of hiring deceased was at the time of his death required to be within reach, liable at any time to be called to work upon the track, and in that sense on duty subject to his employer's orders and control. His wife and his fellow foreman, of the section east of his, so testified, as also respondent's supervisors of tracks who said, in part:

"The section foreman is supposed to be on call at any time, in case of trouble with the switches. . . . I gave him (Papinaw) instructions with reference to those switches because he lived near, and was the

nearest man to be called. Sharrard lived near the Tunnel depot. Although it was on Sharrard's section I gave Papinaw orders that in case of storm to look after the cleaning of those switches. . . . He was supposed to be on call in case the tracks got in bad condition of repair so that he could get there without tying up traffic. . . . If the foreman has not gone to bed before it starts storming he is supposed to go out himself without being called."

Especial and extra duties rested upon deceased that night. He was required to be on call. It was a stormy night, of a kind requiring unusual vigilance as to the switches, and it was imperative that he mail his pay rolls at the Tunnel depot before the evening train left so that they would be in Detroit on the day required. He worked upon those papers until supper time and started after supper for the Tunnel depot to mail them, leaving word with his wife which would keep him in touch with his employer during his absence, as near as possible. It is conceded that he mailed the papers that evening, and they reached their destination on time. It was his duty after mailing them to return and either be at home on call or looking after the switches near by. His last words, so far as there is any proof, show such was his intent, and that he left with this duty on his mind. He was in the habit of retiring early when there was no indication of a storm. Under the terms of his employment it was as much his duty to return to his home, or the switches near there after mailing the papers at the Tunnel depot as it was to go there for that purpose. In going he started along respondent's track, and presumably went that way, as was his custom and that of other employees of respondent, because it was more convenient and the distance to the tunnel shorter than by any other route. He was a section foreman whose special work was to be upon, travel along, and care for his employer's track. He was not a trespasser upon its right of way in any sense which would deny relief under this act, and no question of his negligence is involved in this proceeding. The place and cause of his death are readily inferable from the facts proven. Respondent's counsel say: "He was in the act of going to his home at the time he was killed." If so, under the circumstances of this case, he was performing a duty in the line of his employment out of and in the course of which the accident which caused his death befell him. The accident occurred while he was doing that which a man so employed can reasonably do, and ought to do, and was injured at a place on his employer's premises where, under the proven circumstances, his combined duties made it reasonable that he should be; and there is no proof that he was there for any other purpose than on his return in completing a trip to the Tunnel depot, in the line of his employment, to the place where his employment required him to be on call or at work, and where he would have been during that evening but for the necessity of the trip.



This claim is by a dependent of a workman who was accidentally killed, and whose evidence is therefore not available. In *Grant v. Glasgow Ry.*, 1 B. W. C. 17, it is said:

"If in such a case facts are proved, the natural and reasonable inference from which is that the accident happened while the deceased was engaged in his employment, I think it falls on the employer, if he disputes the claim, to prove that the contrary was the case."

That an employee, not actually at work, is on duty if required to be at a certain place on call and ready for work, is held in *St. Louis, A. & T. Ry. Co. v. Welch*, 72 Tex. 298, where it is said of a member of a railroad bridge gang injured while sleeping in a bunk car provided by his employer:

"The plaintiff at the time of the accident was asleep on a car belonging to the company, provided by it for that purpose, which was placed upon its side track. He was liable to be called upon at any moment to go out with his gang upon duty upon the road. We think he must be held to have been upon duty at the time he received the injury. That the accident occurred when he was resting from his labors, we think makes no difference. He was subject to the call of the company at the time, and his case differs from that of other servants who engage for certain hours of employment and who are injured during the intervals in which the master has no claim upon his services."

The arbitration committee and Industrial Accident Board were at liberty in determining the facts in this case to draw all rational and natural inferences from the evidentiary circumstances shown. To infer and find that the accident, which resulted in Papinaw's death, arose out of and in the course of his employment, had evidential support, and was neither unnatural nor irrational.

The decision of the Industrial Accident Board is therefore affirmed, with costs to appellee.<sup>2</sup>

**Uphoff v. Industrial Board of Illinois, Supreme Court of Illinois, 1916. 271 Ill. 312, 111 N. E. 128.**

Petition by Frank Uphoff for writ of certiorari against the Industrial Board of Illinois and others to review an award to B. C. Bruner for personal injuries, made under the Workmen's Compensation Law. The writ denied, and plaintiff brings error.

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<sup>2</sup> Compare with the principal case *Wheeling Corrugating Co. v. McManigal*, 41 F. (2d) 593 (1930). In that case the employee was drowned. There were no witnesses. The question was whether he accidentally fell into the water and lost his life by drowning, or died of natural causes and thereafter fell into the water. There was conflict of testimony as to how much water came from his lungs after the body was recovered. The commissioner entered an award in claimant's favor. The court sustained it saying that the findings of the commissioner were supported by substantial evidence and that the court would not weigh the evidence to pass independently upon the facts.

CARTER, J. In August, 1913, the plaintiff in error, Frank Uphoff, employed the defendant in error B. C. Bruner to help build a broom corn shed on Uphoff's farm near Mattoon, Ill. While Bruner was working on this structure, a piece of metal flew from the hammer he was using and struck his eye, destroying its sight. He filed a petition with the Industrial Board of Illinois, asking that damages be awarded him for the loss of his eye under the Workmen's Compensation Act of 1913. The arbitration committee appointed by the Industrial Board under that act awarded him \$1,442 for his injury, and this award was affirmed by the majority of the Industrial Board. Uphoff thereafter filed a petition in the superior court of Cook County for a writ of certiorari. Under that writ the proceedings of the Industrial Board were reviewed and an order entered sustaining said proceedings. This writ of error was then sued out.

Counsel for plaintiff in error contend that the Industrial Board was without jurisdiction as to an injury of the character of the one here in question. The evidence shows that Uphoff has been engaged in farming for the past 18 years; that Bruner had worked as a carpenter for about 30 years; that the building that he was working on was a broom corn shed, 32 by 24 feet and 17½ feet high, requiring for its construction the services of four men for about 10 days. Bruner had been employed by Uphoff for no certain time, but apparently to continue the work until the building was constructed. The accident happened during the seventh day of his employment. He received 30 cents an hour for 10 hours a day and was expected only to do carpenter work. He had never worked for Uphoff before.

Section 1 of the Workmen's Compensation Act provides that any employer may elect to provide and pay compensation for accidental injuries sustained by employees arising in the course of employment and thereby relieve himself from all other liability. It is conceded here that plaintiff in error had given no notice to the Industrial Board of his acceptance of the provisions of said act. He therefore cannot be held liable thereunder unless it can be shown that he is one of the class of employers who are held liable under the act, even though they have not elected to come under it. While the entire act must be read in order to understand its intent and meaning, certain sections must be particularly considered and construed in order to reach a proper conclusion in this case. Paragraph (b) of section 3 of said act reads:

"(b) The provisions of paragraph (a) of this section shall only apply to an employer engaged in any of the following occupations, enterprises or businesses, namely:

"1. The building, maintaining, repairing or demolishing of any structure;

"2. Construction, excavating or electrical work;

"3. Carriage by land or water and loading and unloading in connection therewith;

"4. The operation of any warehouse or general or terminal storehouses;

"5. Mining, surface mining or quarrying;

"6. Any enterprise in which explosive materials are manufactured, handled or used in dangerous quantities;

"7. In any enterprise wherein molten metal, or explosive or injurious gases or vapors or inflammable vapors or fluids, or corrosive acids are manufactured, used, generated, stored or conveyed in dangerous quantities;

"8. In any enterprise in which statutory or municipal ordinance regulations are now or shall hereafter be imposed for the regulating, guarding, use or the placing of machinery or appliances, or for the protection and safeguarding of the employees or the public therein; each of which occupations, enterprises or businesses are hereby declared to be extrahazardous."

Section 4 defines what shall be understood by the term "employer" in said act. There is nothing in said section which will throw especial light on the question herein involved. If that section were construed alone, Uphoff might be considered an employer coming within the provisions of said act. Section 5 provides that:

"The term 'employee' as used in the act shall be construed to mean: . . . Second—Every person in the service of another under any contract of hire, express or implied, oral or written, . . . but not including any person whose employment is but casual or who is not engaged in the usual course of the trade, business, profession or occupation of his employer."

The intention of the lawmakers is the law. This intention is to be gathered from the necessity or reason of the enactment and the meaning of the words, enlarged or restricted according to their real intent. In construing a statute the courts are not confined to the literal meaning of the words. A thing within the intention is regarded within the statute though not within the letter. A thing within the letter is not within the statute, if not also within the intention. When the intention can be collected from the statute, words may be modified or altered, so as to obviate all inconsistency with such intention. *Hoyne v. Danisch*, 264 Ill. 467. When great inconvenience or absurd consequences will result from a particular construction that construction should be avoided, unless the meaning of the Legislature be so plain and manifest that avoidance is impossible. *People v. Wren*, 4 Scam. 269. The courts are bound to presume that absurd consequences leading to great injustice were not contemplated by the Legislature, and a construction should be adopted that it may be reasonable to presume was contemplated. 2 Lewis' *Sutherland on Stat. Const.* § 489; *People v. City of Chicago*,

152 Ill. 546; Canal Com'rs v. Sanitary District, 184 Ill. 597. A statute is passed as a whole, and not in parts or sections; hence each part or section should be construed in connection with every other part or section. In order to get the real intention of the Legislature, attention must not be confined to the one section to be construed. Warner v. King, 267 Ill. 82, 107 N. E. 837, and cited cases.

Numerous authorities from other jurisdictions construing Workmen's Compensation Acts have been cited, and frequent references have been made to acts in other jurisdictions. Both counsel have cited authorities which, it is argued, support the conclusion contended for. The wording of our statute is so different on the question here under consideration that the other acts or decisions could have very little weight as to the proper construction to be here given, and further reference to them is unnecessary.

Manifestly, from the reading of the above-quoted sections of the act, some employers were not intended to be included in the act unless they elected so to be. Clearly, under the quoted sections, read in connection with the remainder of the act, farm laborers engaged in general farming would not be covered by the act, unless the farmer elected to accept the act under the provisions of section 1.

It is contended by counsel for defendants in error that plaintiff in error must be held to come under the provisions of the act under subdivision 1 of paragraph (b) of section 3, as the broom corn shed would be included in the provisions of that section in the building "of any structure." This could only be true if it were held that in so building such broom corn shed the farmer was engaged in an occupation, enterprise, or business, and was engaged in the usual course of his "trade, business, profession, or occupation," and that the employment was not casual. It is also plain that the Legislature only intended to include under paragraph (b) any such occupations, enterprises, or businesses of the employer when they were properly considered to be "extra-hazardous." It is true that the clause in subdivision 8 of said paragraph (b) calling all of these trades, businesses, enterprises, or occupations extrahazardous was inserted for the purpose of making clear what was considered extrahazardous; but it is also clear that the Legislature did not intend to include work that every one knows is not extrahazardous, or even hazardous.

It is not seriously contended by counsel that the mere building of this crib could be properly classed as the business or occupation of plaintiff in error, but it is earnestly urged that it could properly be considered under the term "enterprise." An enterprise is "an undertaking of hazard; an arduous attempt." 15 Cyc. 1053, and cited cases. Lexicographers define an "enterprise" as:

"An undertaking; something projected and attempted; an attempt or project, particularly an undertaking of some importance or one

requiring boldness, energy or perseverance; an arduous or hazardous attempt, as, a warlike enterprise."

The building of this shed might be classed under the head of something projected or attempted, but hardly as an important undertaking, requiring courage or energy, or one that was arduous or hazardous. To say that the word "enterprise" covered the building of any structure, however small, would lead, in some instances, to absurd consequences. A chicken coop or dog kennel ten feet square and four or five feet high would be a "structure" in a technical sense of the term, but it would hardly be contended that such a structure was within the meaning of this act; according to the intent of the Legislature. "Carriage by land" under subdivision 3 of said paragraph (b), in the strict, literal meaning of the term might require that it include the hauling of grain by team and wagon from the farm to the elevator. Surely that was not within the legislative intention. The word "excavating," under subdivision 2 of said paragraph (b), might cover, technically, the digging of a post hole on a farm; but it was certainly never so intended. It is plain, from the use of the word "enterprise" in other subdivisions of said paragraph (b), that it was intended to mean a work of some importance, that might properly be considered arduous or hazardous. The building of this sort of a structure was hardly more hazardous than the building of a dog kennel or chicken coop, or the building of an ordinary board fence for the farm. From any fair construction of the act the Legislature never intended to call working on every farm structure, no matter how small, as extrahazardous. . . .

Counsel for defendant in error Bruner contends that the decision of the Industrial Board under this statute is decisive of this question and cannot be inquired into by the courts. This contention cannot be supported. The decision of the Industrial Board is only binding when it is acting within its powers. This court said in *Courter v. Simpson Construction Co.*, 264 Ill. 488, that "the Industrial Board has no jurisdiction to apply the act to persons or corporations who are not subject to its provisions, nor to an accident not within the provisions of the act," and that if it did so, the remedy was in the courts. See also, to the same effect, *Borgnis v. Falk Co.*, 147 Wis. 327. In view of what we have already said, it is clear that the Industrial Board was without jurisdiction in this matter.

The judgment of the superior court is reversed, and the cause remanded, with directions to set aside and hold for naught the finding of the Industrial Board.

Reversed and remanded, with directions.<sup>3</sup>

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<sup>3</sup> The extent to which the courts should review "errors of law" in the nature of minor interpretations of statutes and questions of "mixed fact and law" has been much discussed in recent years, with an ever increasing urge from some quarters that the line of cleavage between the courts' power and that of the

**O'Leary v. Brown-Pacific-Maxon, Inc., Supreme Court of the United States, 1951. 340 U. S. 504, 95 L. Ed. 483, 71 S. Ct. 470.**

MR. JUSTICE FRANKFURTER delivered the opinion of the court.

In this case we are called upon to review an award of compensation under the Longshoremen's and Harbor Workers' Compensation Act. Act of March 4, 1927, 44 Stat. 1424, as amended, 33 USC § 901 et seq. The award was made on a claim arising from the accidental death of an employee of Brown-Pacific-Maxon, Inc., a government contractor operating on the island of Guam. Brown-Pacific maintained for its employees a recreation center near the shoreline, along which ran a channel so dangerous for swimmers that its use was forbidden and signs to that effect erected. John Valak, the employee, spent the afternoon at the center, and was waiting for his employer's bus to take him from the area when he saw or heard two men, standing on the reefs beyond the channel, signaling for help. Followed by nearly twenty others, he plunged in to effect a rescue. In attempting to swim the channel to reach the two men he was drowned.

A claim was filed by his dependent mother, based on the Longshoremen's Act and on an Act of August 16, 1941, extending the compensation provisions to certain employment in overseas possessions. 55 Stat. 622, 56 Stat. 1035, as amended, 42 USC § 1651. In due course of the statutory procedure, the Deputy Commissioner found as a "fact" that "at the time of his drowning and death the deceased was using the recreational facilities sponsored and made available by the employer for the use of its employees and such participation by the deceased was an incident of his employment, and that his drowning and death arose out of and in the course of said employment. . . ." Accordingly, he awarded a death benefit of \$9.38 per week. Brown-Pacific and its insurance carrier thereupon petitioned the District Court under § 21 of the Act to set aside the award. The Court denied the petition on the ground that "there is substantial evidence . . . to sustain the compensation order." On appeal, the Court of Appeals for the Ninth Circuit reversed. It concluded that "The lethal currents were not a part of the recreational facilities supplied by the employer and the swimming in them for the rescue of the unknown man was not recreation. It was an act entirely disconnected from any use for which the recreational camp was provided and not in the course of Valak's employment." 182 F. (2d) 772, 773. We granted certiorari, 340 U. S. 849, because the case brought into question judicial review of awards under the Longshoremen's Act in light of the Administrative Procedure Act.

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administrative agency be so established as to accord finality to administrative determinations of such legal questions "if reasonable." See Hart, "Judicial Review of Administrative Action: A Thesis," 9 Geo. Wash. L. Rev. 499 (1941); Landis, "The Administrative Process," pp. 147, 148. The subject is more fully developed in its most recent aspects in cases to be found later in this chapter.

The Longshoremen's and Harbor Workers' Act authorizes payment of compensation for "accidental injury or death arising out of and in the course of employment." § 2 (2), 44 Stat. 1425, 33 USC § 902 (2). As we read its opinion the Court of Appeals entertained the view that this standard precluded an award for injuries incurred in an attempt to rescue persons not known to be in the employer's service, undertaken in forbidden waters outside the employer's premises. We think this is too restricted an interpretation of the Act. Workmen's compensation is not confined by common-law conceptions of scope of employment. *Cardillo v. Liberty Mutual Ins. Co.*, 330 U. S. 469, 481; *Matter of Waters v. Taylor Co.*, 218 N. Y. 248, 251, 112 N. E. 727, 728. The test of recovery is not a causal relation between the nature of employment of the injured person and the accident. *Thom v. Sinclair*, [1917] A. C. 127, 142. Nor is it necessary that the employee be engaged at the time of the injury in activity of benefit to his employer. All that is required is that the "obligations or conditions" of employment create the "zone of special danger" out of which the injury arose. *Ibid.* A reasonable rescue attempt, like pursuit in aid of an officer making an arrest, may be "one of the risks of the employment, an incident of the service, foreseeable, if not foreseen, and so covered by the statute." *Matter of Babington v. Yellow Taxi Corp.*, 250 N. Y. 14, 17, 164 N. E. 726, 727; *Puttkammer v. Industrial Commission*, 371 Ill. 497, 21 N. E. (2d) 575. This is not to say that there are not cases "where an employee, even with the laudable purpose of helping another, might go so far from his employment and become so thoroughly disconnected from the service of his employer that it would be entirely unreasonable to say that injuries suffered by him arose out of and in the course of his employment." *Matter of Waters v. Taylor Co.*, 218 N. Y. at 252, 112 N. E. at 728. We hold only that rescue attempts such as that before us are not necessarily excluded from the coverage of the Act as the kind of conduct that employees engage in as frolics of their own.

The Deputy Commissioner treated the question whether the particular rescue attempt described by the evidence was one of the class covered by the Act as a question of "fact." Doing so only serves to illustrate once more the variety of ascertainties covered by the blanket term "fact." Here of course it does not connote a simple, external, physical event as to which there is conflicting testimony. The conclusion concerns a combination of happenings and the inferences drawn from them. In part at least, the inferences presuppose applicable standards for assessing the simple, external facts. Yet the standards are not so severable from the experience of industry nor of such a nature as to be peculiarly appropriate for independent judicial ascertainment as "questions of law."

Both sides conceded that the scope of judicial review of such findings of fact is governed by the Administrative Procedure Act. Act of June 11, 1946, 60 Stat. 237, 5 USC § 1001 et seq. The standard, therefore, is

that discussed in *Universal Camera Corp. v. Labor Board*, ante, p. 474. It is sufficiently described by saying that the findings are to be accepted unless they are unsupported by substantial evidence on the record considered as a whole. The District Court recognized this standard.

When this Court determines that a Court of Appeals has applied an incorrect principle of law, wise judicial administration normally counsels remand of the cause to the Court of Appeals with instructions to reconsider the record. Compare *Universal Camera Corp. v. Labor Board*, supra. In this instance, however, we have a slim record and the relevant standard is not difficult to apply; and we think the litigation had better terminate now. Accordingly, we have ourselves examined the record to assess the sufficiency of the evidence.

We are satisfied that the record supports the Deputy Commissioner's finding. The pertinent evidence was presented by the written statements of four persons and the testimony of one witness. It is, on the whole, consistent and credible. From it the Deputy Commissioner could rationally infer that Valak acted reasonably in attempting the rescue, and that his death may fairly be attributable to the risks of the employment. We do not mean that the evidence compelled this inference; we do not suggest that had the Deputy Commissioner decided against the claimant, a court would have been justified in disturbing his conclusion. We hold only that on this record the decision of the District Court that the award should not be set aside should be sustained.

### Judge v. Agency: Comparative Scope of Review

The issues presented in workmen's compensation cases are not unlike those presented in many civil actions tried before a trial court without a jury. These cases afford a convenient point, therefore, to consider the comparative standing (insofar as concerns the scope of judicial review) of decisions of trial judges and determinations of administrative agencies.

The *Brown-Pacific-Maxon* case indicates that the administrative determination in a workmen's compensation case may be accorded greater deference by the reviewing court than are decisions of trial judges, sitting without a jury, on mixed questions of fact and law. Many state court decisions of recent vintage could be cited in support of this trend. In *Satchell v. Industrial Accident Commission* (Cal. App. 1949), 210 P. (2d) 867, for example, it appeared that on the day before Christmas, an employee of a cleaning establishment drank some cleaning fluid, believing it to be whiskey. The mistake was fatal. Did his death arise out of and in the course of his employment? The court affirmed a grant of compensation, declaring this was a question of fact, for the Commission to decide.

As Judge Frank put it in *Orvis v. Higgins* (CA 2nd, 1950), 180 F. (2d) 537: "A wag might say that a verdict is entitled to high respect



because the jurors are inexperienced in finding facts, an administrative finding is given high respect because the administrative officers are specialists (guided by experts) in finding a particular class of facts, but, paradoxically, a trial judge's finding has far less respect because he is blessed neither with jurors' inexperience nor administrative officers' expertness."

Is this a healthy state of affairs? The Hoover Commission Task Force on Legal Services and Procedure concluded in its 1955 Report (p. 217): "The decisions which such agencies hand down affect personal and property rights commensurate in importance with the decisions of all the United States district courts. There is no longer any general necessity for according greater effect, upon review, to the decisions of Federal agencies than to the decisions of district courts."

### Monopolies and Unfair Trade

**Federal Trade Commission v. Klesner, Supreme Court of the United States, 1929. 280 U. S. 19, 74 L. Ed. 138, 50 S. Ct. 1.**

Petition by Federal Trade Commission against Alfred Klesner, doing business under the name of Shade Shop, etc. . . .

MR. JUSTICE BRANDEIS delivered the opinion of the court.

. . . The findings of the Commission are in substance as follows:

Sammons has for many years done business in Washington as maker and seller of window shades, under the name of "The Shade Shop." Prior to 1914, that name had, by long use, come to signify to the buying public of the District the business of Sammons. The concern known as Hooper & Klesner has also been in business in Washington for many years. Prior to 1915, its trade had consisted mainly of painting and of selling and hanging wallpaper. It had dealt also, to some extent, in window shades, taking orders which it had executed either by Sammons or some other maker of window shades. In 1914, Hooper & Klesner leased a new store pursuant to an arrangement with Sammons, and sublet to him a part of it. There Sammons continued his business of making and selling window shades as an independent concern under the name of "The Shade Shop." His gross sales there were at the rate of \$60,000 a year. On a Sunday in November, 1915, he removed all his effects from those premises and established his business in another building four doors away.

Sammons' removal was in confessed violation of his agreement with Hooper & Klesner. An acrimonious controversy ensued. Threats of personal violence led to Sammons having Klesner arrested, and this to bitter animosity. Out of spite to Sammons, and with the purpose and intent of injuring him and getting his trade, Hooper & Klesner decided to conduct on its own account, in the premises which Sammons had vacated, the business of making and selling window shades. It placed upon its show windows, and also upon its letterheads and billheads,

the words "Shade Shop," and listed its business in the local telephone directory as "Shade Shop, Hooper & Klesner" and as "Shade Shop." A like sign was placed on its delivery trucks. This use by Hooper & Klesner of the term "Shade Shop" has caused, and is causing, "confusion to the window-shade purchasing public throughout the District," and, on certain occasions, customers who entered Hooper & Klesner's shop were deceived by employees, being led to believe that it was Sammons'. Meanwhile, Klesner had become sole owner of the business.

Such were the findings of the Commission. . . .

[The Court of Appeals of the District of Columbia dismissed a suit brought to enforce the Commission's order.]

. . . Section 5 of the Federal Trade Commission Act does not provide private persons with an administrative remedy for private wrongs. The formal complaint is brought in the Commission's name; the prosecution is wholly that of the government; and it bears the entire expense of the prosecution. A person who deems himself aggrieved by the use of an unfair method of competition is not given the right to institute before the Commission a complaint against the alleged wrongdoer. Nor may the Commission authorize him to do so. He may of course bring the matter to the commission's attention and request it to file a complaint. But a denial of his request is final. And if the request is granted and a proceeding is instituted, he does not become a party to it or have any control over it.

The provisions in the Federal Trade Commission Act (15 USCA §§ 41-51) concerning unfair competition are often compared with those of the Interstate Commerce Act (49 USCA § 1 et seq.) dealing with unjust discrimination. But in their bearing upon private rights, they are wholly dissimilar. The later act imposes upon the carrier many duties; and it creates in the individual corresponding rights. For the violation of the private right it affords a private administrative remedy. It empowers any interested person deeming himself aggrieved to file, as of right, a complaint before the Interstate Commerce Commission; and it requires the carrier to make answer. Moreover, the complainant there, as in civil judicial proceedings, bears the expense of prosecuting his claim. The Federal Trade Commission Act contains no such features.

While the Federal Trade Commission exercises under section 5 the functions of both prosecutor and judge, the scope of its authority is strictly limited. A complaint may be filed only "if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public." This requirement is not satisfied by proof that there has been misapprehension and confusion on the part of purchasers, or even that they have been deceived—the evidence commonly adduced by the plaintiff in "passing off" cases in order to establish the alleged private wrong. It is true that in suits by private

traders to enjoin unfair competition by "passing off," proof that the public is deceived is an essential element of the cause of action. This proof is necessary only because otherwise the plaintiff has not suffered an injury. There, protection of the public is an incident of the enforcement of a private right. But to justify the Commission in filing a complaint under section 5, the purpose must be protection of the public. The protection thereby afforded to private persons is the incident. Public interest may exist although the practice deemed unfair does not violate any private right. In *Federal Trade Commission v. Beech-Nut Packing Co.*, 257 U. S. 441, 42 S. Ct. 150, 66 L. Ed. 307, 19 A. L. R. 882, a practice was suppressed as being against public policy, although no private right either of a trader or of a purchaser appears to have been invaded. In *Federal Trade Commission v. Winsted Hosiery Co.*, 258 U. S. 483, 42 S. Ct. 384, 66 L. Ed. 729, an unfair practice was suppressed because it affected injuriously a substantial part of the purchasing public, although the method employed did not involve invasion of the private right of any trader competed against.

In determining whether a proposed proceeding will be in the public interest the Commission exercises a broad discretion. But the mere fact that it is to the interest of the community that private rights shall be respected is not enough to support a finding of public interest. To justify filing a complaint the public interest must be specific and substantial. Often it is so because the unfair method employed threatens the existence of present or potential competition. Sometimes, because the unfair method is being employed under circumstances which involve flagrant oppression of the weak by the strong. Sometimes, because, although the aggregate of the loss entailed may be so serious and widespread as to make the matter one of public consequence, no private suit would be brought to stop the unfair conduct, since the loss to each of the individuals affected is too small to warrant it.

The alleged unfair competition here complained of arose out of a controversy essentially private in its nature. The practice was persisted in largely out of hatred and malice engendered by Sammons' act. It is not claimed that the article supplied by Klesner was inferior to that of Sammons, or that the public suffered otherwise financially by Klesner's use of the words "Shade Shop." It is significant that the complaint before the Commission was not filed until after the dismissal, in 1920, of a suit which had been brought by Sammons in 1915, in the Supreme Court of the District, to enjoin Klesner's use of the words "Shade Shop." When the Commission directed the filing of the complaint Hooper & Klesner had been using those words in its business for five years. They had been used for nearly seven years before the order here in question was made; and for nearly nine years before this suit to enforce it was begun. Whatever confusion had originally resulted from Klesner's use of the words must have been largely dissipated before the

Commission first took action. If members of the public were in 1920, or later, seriously interested in the matter, it must have been because they had become partisans in the private controversy between Sammons and Klesner.

The order here sought to be enforced was entered upon a complaint which had in terms been authorized by a resolution of the Commission. The resolution declared, in an appropriate form, both that the Commission had reason to believe that Klesner was violating section 5 and that it appeared to the Commission that a proceeding by it in respect thereof would be to the interest of the public. Thus, the resolution was sufficient to confer upon the Commission jurisdiction of the complaint. Section 5 makes the Commission's finding of facts conclusive, if supported by evidence. Its preliminary determination that institution of a proceeding will be in the public interest, while not strictly within the scope of that provision, will ordinarily be accepted by the courts. But the Commission's action in authorizing the filing of a complaint, like its action in making an order thereon, is subject to judicial review. The specific facts established may show, as a matter of law, that the proceeding which it authorized is not in the public interest, within the meaning of the act. If this appears at any time during the course of the proceeding before it, the Commission should dismiss the complaint. If, instead, the Commission enters an order, and later brings suit to enforce it, the Court should, without enquiry into the merits, dismiss the suit.

The undisputed facts, established before the Commission, at the hearings on the complaint, showed affirmatively the private character of the controversy. It then became clear (if it was not so earlier) that the proceeding was not one in the interest of the public; and that the resolution authorizing the complaint had been improvidently entered. Compare *Gerard C. Henderson, The Federal Trade Commission*, pp. 52-54, 174, 228, 229, 337. It is on this ground that the judgment dismissing the suit is affirmed.<sup>4</sup>

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<sup>4</sup> See 43 *Harv. L. Rev.* 285 (1929); 24 *Ill. L. Rev.* 815 (1930), for comment on the principal case.

Certain of the more recent supreme court opinions throw doubt upon the statements of the court in the Klesner case as to the kind of proof required to establish the existence of "public interest." *Federal Trade Commission v. Royal Milling Co.*, 288 U. S. 212, 77 L. Ed. 706, 53 S. Ct. 335 (1933); *Federal Trade Commission v. Algoma Lumber Co.*, 291 U. S. 67, 78 L. Ed. 655, 54 S. Ct. 315 (1934).

For an extended treatment of the subject involved in Trade Commission cases, see McFarland, "Judicial Control of the Federal Trade Commission and the Interstate Commerce Commission" (1933), chapter III. For an earlier study of the Federal Trade Commission, a study that is an invaluable aid to an understanding of that tribunal, see Henderson, "Federal Trade Commission" (1924).

A more liberal attitude toward the conclusiveness of the findings of the Federal Trade Commission developed in the mid-thirties. For example, in *Federal*

**American Airlines, Inc. v. North American Airlines, Inc., Supreme Court of the United States, 1956. 351 U. S. 79, 100 L. Ed. —, 76 S. Ct. 600.**

MR. JUSTICE MINTON delivered the opinion of the court.

Twentieth Century Airlines, Inc., was issued a letter of registration as a large irregular air carrier by the Civil Aeronautics Board in 1947. For some reason, beginning in 1951 it conducted its business under the name of North American Airlines. On March 3, 1952, it amended its articles of incorporation so as legally to change its name to North American Airlines, Inc. By letter dated March 11, 1952, it requested the C.A.B. to reissue its letter of registration in the new corporate name. The Board took no action on that request, but rather, in August 1952, adopted an Economic Regulation requiring every irregular carrier after November 15, 1952, to do business in the name in which its letter of registration was issued. 14 CFR § 291.28. The Board explained that under the Regulation it would allow continued use of a different name to which good will had become attached, except where use of such name constitutes a violation of § 411 of the Civil Aeronautics Act, 52 Stat. 1003, as amended, 66 Stat. 628, 49 USC § 491, which prohibits unfair or deceptive commercial practices and unfair methods of competition. 17 Fed. Reg. 7809.

On October 6, 1952, respondent applied for permission to continue use of its name, "North American Airlines." Petitioner, American Airlines, on October 17, 1952, filed a memorandum with the Board requesting denial of North American's application for the reasons, among others, that use of the name "North American" infringed upon its long-established trade name, "American," and constituted an unfair method of competition in violation of § 411 of the Act. The Board, as authorized

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Trade Commission v. R. F. Keppel & Bro., Inc., 291 U. S. 304, 78 L. Ed. 814, 54 S. Ct. 423 (1934), the question arose as to the determination of whether or not a given practice was an "unfair method of competition." The court, upholding the commission decision on this point, said (Mr. Justice Stone writing the opinion):

"While this court has declared that it is for the courts to determine what practices or methods of competition are to be deemed unfair, . . . in passing upon that question the determination of the commission is of weight. It was created with the avowed purpose of lodging the administrative functions committed to it in 'a body specially competent to deal with them by reason of information, experience and careful study of the business and economic conditions of the industry affected,' and it was organized in such a manner, 'with respect to the length and expiration of the terms of office of its members, as would give to them an opportunity to acquire the expertness in dealing with these special questions concerning industry that comes from experience.' Report of Senate Committee on Interstate Commerce, No. 597, June 13, 1914, 63rd Cong., 2d Sess., pp. 9, 11. . . . If the point were more doubtful than we think it, we should hesitate to reject the conclusion of the commission, based as it is upon clear, specific, and comprehensive findings supported by evidence."

by § 411, on its own motion instituted an investigation and hearing into whether there was a violation of § 411 by North American. It consolidated with that proceeding an investigation and hearing into the matter of North American's application for change of name in its letter of registration. American was granted leave to intervene in the consolidated proceeding.

After extensive hearings, the Board found that respondent's use of the name "North American" in the air transportation industry, in which it competed with American, had caused "substantial public confusion," which was "likely to continue" and which constituted "an unfair or deceptive practice and an unfair method of competition within the meaning of Section 411." Docket Nos. 5774 and 5928 (Nov. 4, 1953), 14-15 (mimeo). It found that the public interest required elimination of the use of the name, and accordingly it denied the application of North American and ordered it to "cease and desist from engaging in air transportation under the name 'North American Airlines, Inc.,' 'North American Airlines,' 'North American,' or any combination of the word 'American,'" Id., at 15-16. On petition for review by North American, the Court of Appeals for the District of Columbia set aside the Board's order. 97 U. S. App. D. C. —, 228 F. 2d 432. American, having been admitted as a party below by intervention, sought, and we granted, certiorari. 350 U. S. 894.

As we understand its opinion, the Court of Appeals set aside the order because the public interest in this proceeding was inadequate to justify exercise of the Board's jurisdiction under § 411. Although the court was critical of the finding of "substantial public confusion," it did not, on its disposition of the case, expressly disturb that or any other of the Board's findings. For the purposes of review here, we will accept the findings, and there is no cause for this Court to review the evidence. *Universal Camera Corp. v. Labor Board*, 340 U. S. 474, has no application in the present posture of the case before us. The questions then presented are whether confusion between the parties' trade names justified a proceeding by the Board to protect the public and whether the kind of confusion found by the Board could support a conclusion of a violation of the statute by respondent.

This is a case of first impression under § 411. That section provides that

"The Board may, upon its own initiative or upon complaint . . . if it considers that such action by it would be in the interest of the public, investigate and determine whether any air carrier . . . has been or is engaged in unfair or deceptive practices or unfair methods of competition in air transportation or the sale thereof."

If the Board finds that the carrier is so engaged, "it shall order such air carrier . . . to cease and desist from such practices or methods of competition." Section 411 was modeled closely after § 5 of the Federal

Trade Commission Act, which similarly prohibits "unfair methods of competition in commerce, and unfair or deceptive acts or practices" and provides for issuance of a complaint "if it shall appear to the Commission that a proceeding by it . . . would be to the interest of the public." 38 Stat. 719, as amended, 15 USC § 45. We may profitably look to judicial interpretation of § 5 as an aid in the resolution of the questions raised here under § 411.

It should be noted at the outset that a finding as to the "interest of the public" under both § 411 and § 5 is not a prerequisite to the issuance of a cease and desist order as such. Rather, consideration of the public interest is made a condition upon the assumption of jurisdiction by the agency to investigate trade practices and methods of competition and determine whether or not they are unfair. Thus, this Court has held that, under § 5, the Federal Trade Commission may not employ its powers to vindicate private rights and that whether or not the facts, on complaint or as developed, show the public interest to be sufficiently "specific and substantial" to authorize a proceeding by the Commission is a question subject to judicial review. *Federal Trade Comm'n v. Klesner*, 280 U. S. 19. See also *Federal Trade Comm'n v. Keppel & Bros., Inc.*, 291 U. S. 304; *Federal Trade Comm'n v. Royal Milling Co.*, 288 U. S. 212.

In the *Klesner* case, two District of Columbia retailers, with a long history of acrimonious personal and business relations, were both operating stores called the "Shade Shop." This Court held that the public interest merely in resolving their private unfair competition dispute would not justify the Commission in issuing a complaint. The courts of law are open to competitors for the settlement of their private legal rights, one against the other. The Board, under a mandate from Congress, is charged with the protection of the public interest as affected by practices of carriers in the field of air transportation. In exercising our function of review of the Board's jurisdiction to protect the public interest by a proceeding which may be generated from facts also giving rise to a private dispute, we must take account of the significant differences between § 5 and § 411. Section 5 is concerned with purely private business enterprises which cover the full spectrum of economic activity. On the other hand, the air carriers here conduct their business under a regulated system of limited competition. The business so conducted is of especial and essential concern to the public, as is true of all common carriers and public utilities. Finally, Congress has committed the regulation of this industry to an administrative agency of special competence that deals only with the problems of the industry.

The practices of the competitors here clashed in a field where Congress was specifically concerned to protect the public interest. Demonstrated confusion of the public as to the origin of major air transportation services may be of obvious national public concern. The criteria which

the Board employed to determine whether the confusion here created a problem of concern to the public are contained in the following quotation from its report:

" . . . the record is convincing that the public interest requires this action in order to prevent further public confusion between respondent and intervenor due to similarity of names. The maintenance of high standards in dealing with the public is expected of common carriers, and the public has a right to be free of the inconveniences which flow from confusion between carriers engaging in the transportation of persons by air. The speed of air travel may well be diminished when passengers check in for flights with the wrong carrier, or attempt to retrieve baggage from the wrong carrier, or attempt to purchase transportation from the wrong carrier, or direct their inquiries to the wrong carrier. Friends, relatives or business associates planning to meet passengers or seeking information on delayed arrivals are subject to annoyance or worse when confused as to the carrier involved. The proper handling of complaints from members of the public is impeded by confusion as to the carrier to whom the complaint should be presented. The transportation itself may differ from what the confused purchaser had anticipated (e. g., in terms of equipment), even though the time and place of arrival may be about the same. It is obvious that public confusion between air carriers operating between the same cities is adverse to the public interest . . . " Docket Nos. 5774 and 5928 (Nov. 4, 1953), 12-13 (mimeo).

Under § 411 it is the Board that speaks in the public interest. We do not sit to determine independently what is the public interest in matters of this kind, committed as they are to the judgment of the Board. We decide only whether, in determining what is the public interest, the Board has stayed within its jurisdiction and applied criteria appropriate to that determination. The Board has done that in the instant case. Considerations of the high standards required of common carriers in dealing with the public, convenience of the traveling public, speed and efficiency in air transport, and protection of reliance on a carrier's equipment are all criteria which the Board in its judgment may properly employ to determine whether the public interest justifies use of its powers under § 411.

The Board had jurisdiction to inquire into the methods of competition presented here, and its evidentiary findings concerned confusion of the type which can support a finding of violation of § 411. The judgment of the Court of Appeals must therefore be reversed. However, since we do not understand the court to have decided whether the Board's findings were supported by substantial evidence on the record as a whole, the case is remanded to the Court of Appeals for further proceedings in the light of this opinion.

[MR. JUSTICE DOUGLAS and MR. JUSTICE REED dissented.]



**Jacob Siegel Co. v. Federal Trade Commission, Supreme Court of the United States, 1946. 327 U. S. 608, 90 L. Ed. 888, 66 S. Ct. 758.**

MR. JUSTICE DOUGLAS delivered the opinion of the court.

The alpaca and the vicuna are animals whose fleece is used in the manufacture of fabrics. The fleece of the vicuna is, indeed, one of the finest and is extremely rare; and fabrics made of it command a high price. Petitioner manufactures overcoats and topcoats and markets them under the name Alpacuna. They contain alpaca, mohair, wool, and cotton but no vicuna.

The Federal Trade Commission in proceedings under § 5 of the Federal Trade Commission Act (52 Stat. 111, 15 USC § 45) found that petitioner had made certain misrepresentations in the marketing of its coats. It found, for example, that the representations that the coats contained imported angora and guanaco were false. It also found that the name Alpacuna is deceptive and misleading to a substantial portion of the purchasing public, because it induces the erroneous belief that the coats contain vicuna. But there was no finding that petitioner had made representations that Alpacuna in fact contained vicuna. It accordingly issued a cease and desist order which, among other things, banned the use of the word Alpacuna to describe petitioner's coats. 36 F. T. C. 563. The Circuit Court of Appeals affirmed. 150 F. 2d 751. It held that the Commission's findings respecting the use of the name Alpacuna were supported by substantial evidence. It was of the view, however, that the prohibition of the use of the name was far too harsh; and it stated that it would have modified the order to permit Alpacuna to be used with qualifying language had it thought that Federal Trade Commission v. Royal Milling Co., 288 U. S. 212, was still a controlling authority. But it concluded that that case had been so limited by subsequent decisions of the court, involving other administrative agencies, that control of the remedy lay exclusively with the Commission. The case is here on a petition for a writ of certiorari which we granted because of the importance of the question presented.

By the Federal Trade Commission Act Congress made unlawful "unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce." § 5 (a). It provided that when the Commission's cease and desist orders were challenged in the courts, the findings of the Commission "as to the facts, if supported by evidence, shall be conclusive." § 5 (c). But it did not limit the reviewing court to an affirmance or reversal of the Commission's order. It gave the court power to modify the order as well.

The power to modify extends to the remedy as Federal Trade Commission v. Royal Milling Co., *supra*, indicates. In that case, the Commission barred the use of the words "milling company" since the company, though blending and mixing flour, did not manufacture it. The court concluded that a less drastic order was adequate for the evil at hand

and remanded the case so that the Commission might add appropriate qualifying words which would eliminate any deception lurking in the trade name. On the other hand, the excision of a part of the trade name was sustained in *Federal Trade Commission v. Algoma Lumber Co.*, 291 U. S. 67. In that case, "California white pine" was being used to describe what was botanically a yellow pine. The Commission prohibited the use of the word "white" in conjunction with "pine" to describe the product. The court sustained the order.

The Commission has wide discretion in its choice of a remedy deemed adequate to cope with the unlawful practices in this area of trade and commerce. Here, as in the case of orders of other administrative agencies under comparable statutes, judicial review is limited. It extends no further than to ascertain whether the Commission made an allowable judgment in its choice of the remedy. As applied to this particular type of case, it is whether the Commission abused its discretion in concluding that no change "short of the excision" of the trade name would give adequate protection. *Federal Trade Commission v. Algoma Lumber Co.*, *supra*, pp. 81-82. The issue is stated that way for the reason that we are dealing here with trade names which, as *Federal Trade Commission v. Royal Milling Co.*, *supra*, p. 217, emphasizes, are valuable business assets. The fact that they were adopted without fraudulent design or were registered as trademarks does not stay the Commission's hand. *Federal Trade Commission v. Algoma Lumber Co.*, *supra*, p. 79; *Charles of the Ritz Distributors Corp. v. Federal Trade Commission*, 143 F. 2d 676, 679. But the policy of the law to protect them as assets of a business indicates that their destruction "should not be ordered if less drastic means will accomplish the same result." *Federal Trade Commission v. Royal Milling Co.*, *supra*, p. 217. The problem is to ascertain whether that policy and the other policy of preventing unfair or deceptive trade practices can be accommodated. That is a question initially and primarily for the Commission. Congress has entrusted it with the administration of the act and has left the courts with only limited powers of review. The Commission is the expert body to determine what remedy is necessary to eliminate the unfair or deceptive trade practices which have been disclosed. It has wide latitude for judgment and the courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist.

But in the present case, we do not reach the question whether the Commission would be warranted in holding that no qualifying language would eliminate the deception which it found lurking in the word *Alpacuna*. For the Commission seems not to have considered whether in that way the ends of the act could be satisfied and the trade name at the same time saved. We find no indication that the Commission considered the possibility of such an accommodation. It indicated that prohibition of the use of the name was in the public interest since the cease

and desist order prohibited the further use of the name. But we are left in the dark whether some change of name short of excision would in the judgment of the Commission be adequate. Yet that is the test, as the Algoma Lumber Co. and the Royal Milling Co. cases indicate. Its application involves the exercise of an informed, expert judgment. The Commission is entitled not only to appraise the facts of the particular case and the dangers of the marketing methods employed (*Federal Trade Commission v. Winsted Hosiery Co.*, 258 U. S. 483, 494) but to draw from its generalized experience. See *Republic Aviation Corp. v. National Labor Relations Board*, 324 U. S. 793, 801-805. Its expert opinion is entitled to great weight in the reviewing courts. But the courts are not ready to pass on the question whether the limits of discretion have been exceeded in the choice of the remedy until the administrative determination is first made.

The judgment is reversed and the cause is remanded to the Circuit Court of Appeals for further proceedings in conformity with this opinion.

Reversed.<sup>5</sup>

### Public Services

**Interstate Commerce Commission v. Northern Pacific Ry. Co., Supreme Court of the United States, 1910. 216 U. S. 538, 54 L. Ed. 608, 30 S. Ct. 417.**

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a bill to restrain the enforcement of an order of the Interstate Commerce Commission. 16 I. C. C. Rep. 300. A preliminary injunction was granted by four circuit judges, on the ground that the Commission had exceeded its powers, and the case was brought here by appeal. The order was made in a proceeding instituted by the Commission upon its own motion, and required the establishment of through routes and joint rates, for passengers and their baggage, east and west,

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<sup>5</sup> In the Siegel case, the court remanded the matter because the Commission had not considered whether a less drastic remedy might be sufficient. Suppose the Commission had thereafter concluded that nothing less would do, and had re-affirmed its original order. Would the court have sustained its action? In *Alberty v. Federal Trade Commission* (App. D. C., 1950), 182 F. (2d) 36, the Commission's order required a vendor of patent medicines to state in his advertising that his preparation (which was said to relieve symptoms of tiredness or lassitude) would give relief only where such symptoms were caused by simple iron-deficiency anemia, and to state further that the condition of lassitude was caused less frequently by simple iron-deficiency anemia than by other causes, and that in such cases his preparation would not be effective. In short, he was required to state in his advertising that his medicine would offer no relief in most of the cases for which it was intended. The court of appeals was asked to set the order aside on the grounds that the remedy selected had no reasonable relation to the unlawful practices found to exist. Relief was granted.

from and to points on the Chicago and Northwestern Railway between Chicago and Council Bluffs, Iowa, inclusive; and from and to points on the Union Pacific Railroad between Colorado common points and Omaha, Nebraska, and Kansas City, Missouri, inclusive; via Portland, Oregon; to and from points on the Northern Pacific Railway between Portland and Seattle. The joint rates are to be the same as the present rates between the same points via the Northern Pacific road and its connections. This order concerns passenger travel in one direction only. It does not affect round trips, and it does not deal with freight.

The points between Portland and Seattle can be reached from the places mentioned at the other end of the route, by way of the Northern Pacific alone from St. Paul, or by way of the Chicago, Burlington and Quincy, to Billings, Montana, and then by the Northern Pacific for the last thousand miles; the Chicago, Burlington and Quincy being jointly owned and controlled by the Northern Pacific and the Great Northern roads. But an average of 8,000 persons a year goes by way of the Union Pacific to Portland, where, to go further, passengers have to change to the Northern Pacific line. Under present arrangements the Union Pacific issues a coupon with its tickets, entitling the holder to a first-class passage on from Portland, but he has to exchange the coupon for a ticket, to recheck his baggage, and to pay the additional Pullman fare. The effect of the order is to put the Union Pacific on an equal footing with the Northern Pacific in the use for through travel, of the road belonging to the latter between Portland and Seattle. It is said that this road, with the expensive terminals of the Northern Pacific at Tacoma and Seattle, would not be supported by local business, but depends on the traffic of the whole Northern Pacific system. Therefore the Northern Pacific objects to the order and brings this bill.

The authority of the Commission to establish through routes and joint rates is conditioned by the proviso that "no reasonable or satisfactory through route exists." Act of June 29, 1906, c. 3591, § 4. 34 Stat. at L. 589. It is urged that this condition is addressed only to the opinion of the Commission and cannot be re-examined by the courts as a jurisdictional fact. The difficulty of distinguishing between a rule of law for the guidance of a court and a limit set to its power is sometimes considerable. Words that might seem to concern jurisdiction may be read as simply imposing a rule of decision, and often will be read in that way when dealing with a court of general powers. *Fauntleroy v. Lum*, 210 U. S. 230, 235. But even in such a case there may be a difference of opinion, *ibid.* 245, and when we are dealing with an administrative order that seriously affects property rights, and does so by way rather of fiat than of adjudication, there seems to be no reason for not taking the proviso of the statute in its natural sense. See *Interstate Commerce Commission v. Illinois Central R. Co.*, 215 U. S. 452, 470.

We are of opinion then that the Commission had no power to make the order if a reasonable and satisfactory through route already existed, and that the existence of such a route may be inquired into by the courts. How far the courts should go in that inquiry we need not now decide. No doubt in complex and delicate cases great weight at least would be attached to the judgment of the Commission. But in the present instance there is no room for difference as to the facts, and the majority of the Commission plainly could not and would not have made the declaration in their order that there was no such through route, but for a view of the law upon which this court must pass. It is admitted that the Northern Pacific route is shorter than that of the Union Pacific by way of Portland and the running time somewhat less, and it is added by the majority that the "passenger goes in as good a car and is provided with as good a berth and as good a meal."

There is some suggestion that at times the northern route may not be as good as the southern, although at other times it may be better, but the ground of the order avowedly was that the personal preferences of many travelers is to go by the southern way. If they do, it is said, they can select from a great variety of routes as far as Ogden, Utah, they can visit cities not reached by the northern lines, they can search over a wide area for homesteads, they can behold the natural beauties that may be rivalled but not repeated on the other roads. It appears to us that these grounds do not justify the order. The most that can be said of them is that they are reasons for desiring a second through route, but they are not reasons warranting the declaration that "no reasonable or satisfactory through route exists." Obviously that is not true, except by an artificial use of words. It cannot be said that there is no such route, because the public would prefer two. The condition in the statute is not to be trifled away. Except in case of a need such as the statute implies, the injustice pointed out by the Chairman in his dissent is not permitted by the law.

Decree affirmed.<sup>6</sup>

**Interstate Commerce Commission v. Union Pacific R. Co., Supreme Court of the United States, 1912. 222 U. S. 541, 56 L. Ed. 308, 32 S. Ct. 108.**

[The Great Northern, Northern Pacific and Union Pacific Railroads had for many years been hauling lumber from the Pacific Northwest

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<sup>6</sup> Subsequently the Interstate Commerce Act was amended to provide that "The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without complaint, establish through routes, joint classifications, and joint rates, fares or charges . . . and the division of such rates, fares, or charges . . ." Does the amendment shift the line of division between the power of the commission and that of the court?

to St. Paul for 40 cents per hundred pounds, a rate fixed by themselves at a moderately low level in order to encourage shipment. In 1907 the three carriers filed new tariffs proposing a 50-cent rate, alleging as the reason therefor a greatly increased cost of operation. On complaint of various shippers, the commission held hearings and at the conclusion thereof found that the proposed rate was too high, but that it might be fixed at 45 cents. The carriers brought suit to enjoin the enforcement of the order on the ground that the 45-cent rate was "unjust and unreasonable." The case was referred to a master who found that there was no sufficient evidence that the 45-cent rate was confiscatory, but nevertheless it was so low as to be unjust, and hence was beyond the limits of the power delegated to the commission. The circuit court sustained the master and issued an injunction. The commission appealed.]

MR. JUSTICE LAMAR delivered the opinion of the court.

These appeals raise the single question as to whether, in making the 45-cent rate, the Commission acted within or beyond its power. As the statute makes its finding *prima facie* correct (*Cincinnati, H. & D. R. Co. v. Interstate Commerce Commission*, 206 U. S. 154), it will be more convenient to consider the case from the standpoint of the carriers, who first insist that the order was void because made without evidence or finding that the 50-cent rate was unreasonable.

There has been no attempt to make an exhaustive statement of the principle involved, but in cases thus far decided, it has been settled that the orders of the Commission are final unless (1) beyond the power which it could constitutionally exercise; or (2) beyond its statutory power; or (3) based upon a mistake of law. But questions of fact may be involved in the determination of questions of law, so that an order, regular on its face, may be set aside if it appears that (4) the rate is so low as to be confiscatory and in violation of the constitutional prohibition against taking property without due process of law; or (5) if the Commission acted so arbitrarily and unjustly as to fix rates contrary to evidence, or without evidence to support it; or (6) if the authority therein involved has been exercised in such an unreasonable manner as to cause it to be within the elementary rule that the substance, and not the shadow determines the validity of the exercise of the power. *Interstate Commerce Commission v. Illinois C. R. Co.*, 215 U. S. 452; *Southern P. Co. v. Interstate Commerce Commission*, 219 U. S. 433; *Interstate Commerce Commission v. Northern P. R. Co.*, 216 U. S. 538; *Interstate Commerce Commission v. Alabama Midland R. Co.*, 168 U. S. 144, 174.

In determining these mixed questions of law and fact, the court confines itself to the ultimate question as to whether the Commission acted within its power. It will not consider the expediency or wisdom of the order, or whether, on like testimony, it would have made a similar ruling. "The findings of the Commission are made by law *prima facie* true, and

this court has ascribed to them the strength due to the judgments of a tribunal appointed by law and informed by experience." *Illinois C. R. Co. v. Interstate Commerce Commission*, 206 U. S. 441. Its conclusion, of course, is subject to review, but, when supported by evidence, is accepted as final; not that its decision, involving, as it does, so many and such vast public interests, can be supported by a mere scintilla of proof, but the courts will not examine the facts further than to determine whether there was substantial evidence to sustain the order.

We proceed then to a consideration of the carriers' contention that the order was void because made without any testimony that the 50-cent rate of 1907, to St. Paul, was unreasonable. We find that, as far back as 1893, the rate on fir lumber was reduced to 40 cents, on the theory that after a carrier had been paid for transporting a carload of freight from the East to the West, it was better to haul it back loaded with lumber at 40 cents, thereby earning something, than to take it back empty and get nothing. But if, after the empty-car movement had been reversed, the carrier had to be at the expense of hauling cars empty to the West for the purpose of returning them loaded with lumber at the unremunerative rate of 40 cents, there would be a double loss,—it got nothing for hauling the empty car from St. Paul to the coast, and it derived no profit for hauling it back at the low rate. They contend that this situation, in connection with the enormous increase in the cost of operation, not only justified, but required, an advance over the 40-cent rate. And this view of the testimony seems to have been taken by the two commissioners who dissented. If there was no other evidence, the commission's order could not be sustained.

But these facts do not stand alone. In the first place there was no appeal from the master's finding that:

"The carriers concede that they are unable to determine the cost of this traffic, in and of itself; and that they are unable to say, with any satisfactory accuracy, whether or not they make a profit upon it; but they have all conceded that, in their judgment, speaking as experts, the lumber traffic has not been confiscatory, and has not been performed for less than cost."

This concession, of course, does not cover the question at issue, but it does fix a starting point. It establishes an important fact in dealing with the difficult question of determining what is a reasonable rate on a particular article. Where the rates as a whole are under consideration, there is a possibility of deciding, with more or less certainty, whether the total earnings afford a reasonable return. But whether the carrier earned dividends or not sheds little light on the question as to whether the rate on a particular article is reasonable. For, if the carrier's total income enables it to declare a dividend, that would not justify an order requiring it to haul one class of goods for nothing, or for less than a reasonable rate. On the other hand, if the carrier earned no dividend, it

would not have warranted an order fixing an unreasonably high rate on such article. But the absence of direct testimony that the 50-cent rate was unreasonably high is unimportant. Neither can any specific effect be given to the statement of witnesses that the 40-cent rate was low. The reasonableness of rates cannot be proved by categorical answers, like those given, where a witness may, in terms, testify that the goods were worth so much per pound, or the services worth so much a day. Too many elements are involved in fixing a rate on a particular article, over a particular road, to warrant reliance on such method of proof. The matter has to be determined by a consideration of many facts.

In this case the Commission had before it many witnesses and volumes of reports, statistics, and estimates, including the rates on lumber charged by other roads, and those charged by these carriers on other classes of freight. There was evidence that during the fourteen years when the 40-cent rate was in force, the carriers had, by proper management and without wasteful economies, kept their properties in a high state of efficiency, and after paying all the costs of operation, maintenance, depreciation, fixed charges, and sinking funds, had been able to pay reasonable dividends.

There was evidence as to the value of the road, the amounts expended in betterments and paid out in dividends, ratio between the increased earnings and increased expenses, with many tables and estimates tending to show the cost of hauling empty cars, fully loaded cars, and those carrying an average load.

With that sort of evidence before them, rate experts of acknowledged ability and fairness, and each acting independently of the other, may not have reached identically the same conclusion. We do not know whether the results would have been approximately the same. For there is no possibility of solving the question as though it were a mathematical problem to which there could only be one correct answer. Still there was in this mass of facts that out of which experts could have named a rate. The law makes the Commission's finding on such facts conclusive. There was then, under the statute nothing for the companies to do except to comply with the order, or act on the suggestion thrown out in the Commission's answer, and apply for a rehearing, in reliance upon its power and duty to modify its order if the new evidence warranted such change. . . .

Decree reversed.<sup>7</sup>

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<sup>7</sup> The neat categories laid out by Mr. Justice Lamar have proved not nearly so simple as they appear to be. A clear cut and conclusive delineation of the respective powers of court and tribunal cannot be readily stated. It defies formulaic statement. What determines the boundary line? See Albertsworth, "Judicial Review of Administrative Action by the Federal Supreme Court," 35 Harv. L. Rev. 127 (1921).

The distinction between "questions of fact" and "questions of law" superficially may seem perfectly clear and easily made; but it is far from the case.



**St. Joseph Stock Yards Co. v. United States, Supreme Court of the United States, 1936. 298 U. S. 38, 80 L. Ed. 1033, 56 S. Ct. 720.**

[In *Ohio Valley Water Co. v. Ben Avon Borough*, 253 U. S. 287, 40 S. Ct. 527, decided in 1920, ante, p. 530, the rule was announced that in public utility rate-making cases coming up from state utilities commissions "if the owner claims confiscation of his property will result, the state must provide a fair opportunity for submitting that issue to a judicial tribunal for determination upon its own independent judgment as to both law and facts; otherwise the order is void because in conflict with the due process clause."

In the *St. Joseph Stock Yards Co.* case, above cited, decided in 1936, this rule of review was re-examined. The controversy involved in the

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For example, the interpretation of statutes is ordinarily referred to as a process of a legal nature and not mere fact finding. An error in interpretation is usually spoken of as an error of law. But where do we stop *interpreting* the statute (i. e., finding the meaning of the written law), and commence *application* of the statute (i. e., determining whether or not the facts in the given case fall within the statute)? The *Lake Cargo Coal Cases*, which have plagued the Interstate Commerce Commission for years, illustrate the point. The cases involve the power of the Commission over coal rate differentials between different coal fields. The cases have been brought up both under the reasonable rate and the unreasonable preference sections of the Interstate Commerce Act. Can the Commission under either or both of these sections so adjust the rates as to equalize the economic advantages of the several coal fields? If it does so is it deciding a question of law or one of fact? See Mansfield, "The *Lake Cargo Coal Rate Controversy*" (1932); also Cavers, "'Questions of Law' in *Lake Cargo Coal Rate Regulation*," 37 W. Va. L. Q. 391 (1931).

Another kind of "error of law" may affect Commission decisions. To illustrate, in *Northern Pac. Ry. Co. v. Department of Public Works of Washington*, 268 U. S. 39, 69 L. Ed. 836, 45 S. Ct. 412 (1925), it appeared that the state Department of Public Works had ordered a new rate schedule for intrastate transportation of saw logs. The Department had based its determination of operative costs largely upon data found in the published reports of the carriers, and, instead of making direct findings of costs in each instance, it found *average* costs of a group of carriers. The new rate schedule was based upon the cost figures so found. The court said that the "Department's error was fundamental in its nature," and that the use of the average cost "vitiated the whole process of reasoning by which the Department reached its conclusion." Further it said: "The mere admission by an administrative tribunal of matter which under the rules of evidence applicable to judicial proceedings would be deemed incompetent (*United States v. Abilene & Southern Ry. Co.*, 265 U. S. 274, 288, 68 L. Ed. 1016, 44 S. Ct. 565), or mere error in reasoning upon evidence introduced, does not invalidate an order. But where rates found by a regulatory body to be compensatory are attacked as being confiscatory, courts may inquire into the method by which its conclusion was reached. An order based upon a finding made without evidence (*The Chicago Junction Case*, 264 U. S. 258, 263, 68 L. Ed. 667, 44 S. Ct. 317), or upon a finding made upon evidence which clearly does not support it (*Interstate Commerce Commission v. Union Pacific R. Co.*, 222 U. S. 541, 547, 56 L. Ed. 308, 32 S. Ct. 108), is an arbitrary act against which courts afford relief. The error under discussion was of this character. It was a denial of due process."

St. Joseph case originated in October, 1929, when the Secretary of Agriculture, acting under the provisions of the Federal Packers and Stockyards Act of 1921 (42 Stat. 159, 7 USCA § 181), commenced a proceeding which culminated in an order fixing a schedule of maximum charges for stockyard services. The provisions of the act concerning the scope of review of stockyard cases are similar to those of the Interstate Commerce Act, i. e., they are entirely indefinite as to administrative conclusiveness in such cases.

Suit was brought in the Federal District Court to enjoin the enforcement of the order, the plaintiff alleging confiscation. The District Court upheld the rate order, and in so doing expressed the view that the question of the conclusiveness of the administrative findings was an open one under the Federal Packers and Stockyards Act, notwithstanding the Ohio Valley Water Co. case. The District Court held that even though the issue under this act was one involving alleged confiscation, the court was bound under the terms of the statute to accept the findings of the Secretary as final if they were supported by substantial evidence. The opinion expressed the view that it is not within the province of the judiciary to weigh the evidence and pass upon the issues of fact. The Stock Yards Company appealed.

When the case reached the United States Supreme Court, that tribunal, divided six to three, re-affirmed the doctrine of the Ohio Valley Water Company case and held its principle applicable to proceedings under the Packers and Stockyards Act. However, the entire bench confirmed the particular rate order involved in the case, the majority proceeding on the ground that no confiscation was in fact shown by the evidence before the court, and the minority arguing that in no event should the court review the weight of the evidence even though confiscation were claimed.

The opinions of Mr. CHIEF JUSTICE HUGHES, writing for the majority, and Mr. JUSTICE BRANDEIS speaking for himself and for JUSTICES STONE and CARDOZO are excellent expositions of the conflicting theories as to the proper scope of judicial review in such cases. Excerpts of these opinions follow:]

MR. CHIEF JUSTICE HUGHES. . . . .

Third. The scope of judicial review upon the issue of confiscation. . . .

The fixing of rates is a legislative act. In determining the scope of judicial review of that act, there is a distinction between action within the sphere of legislative authority and action which transcends the limits of legislative power. Exercising its rate-making authority, the legislature has a broad discretion. It may exercise that authority directly, or through the agency it creates or appoints to act for that purpose in accordance with appropriate standards. The court does not sit as a board of revision to substitute its judgment for that of the

legislature or its agents as to matters within the province of either. *San Diego Land & Town Co. v. Jasper*, 189 U. S. 439, 446; *Minnesota Rate Cases*, 230 U. S. 352, 433; *Los Angeles Gas Co. v. Railroad Commission*, 289 U. S. 287, 304. When the legislature itself acts within the broad field of legislative discretion, its determinations are conclusive. When the legislature appoints an agent to act within that sphere of legislative authority, it may endow the agent with power to make finding of fact which are conclusive, provided the requirements of due process which are specially applicable to such an agency are met, as in according a fair hearing and acting upon evidence and not arbitrarily. *Interstate Commerce Commission v. Louisville & Nashville R. R. Co.*, 227 U. S. 88, 91; *Virginian Ry. Co. v. United States*, 272 U. S. 658, 663; *Tagg Bros. & Moorhead v. United States*, *supra*, p. 444; *Florida v. United States*, 292 U. S. 1, 12. In such cases, the judicial inquiry into the facts goes no further than to ascertain whether there is evidence to support the findings and the question of the weight of the evidence in determining issues of fact lies with the legislative agency acting within its statutory authority.

But the Constitution fixes limits to the rate-making power by prohibiting the deprivation of property without due process of law or the taking of private property for public use without just compensation. When the legislature acts directly, its action is subject to judicial scrutiny and determination in order to prevent the transgression of these limits of power. The legislature cannot preclude that scrutiny or determination by and declaration or legislative finding. Legislative declaration or finding is necessarily subject to independent judicial review upon the facts and the law by courts of competent jurisdiction to the end that the Constitution as the supreme law of the land may be maintained. Nor can the legislature escape the constitutional limitation by authorizing its agent to make findings that the agent has kept within that limitation. Legislative agencies, with varying qualifications, work in a field peculiarly exposed to political demands. Some may be expert and impartial, others subservient. It is not difficult for them to observe the requirements of law in giving a hearing and receiving evidence. But to say that their findings of fact may be made conclusive where constitutional rights of liberty and property are involved, although the evidence clearly establishes that the findings are wrong and constitutional rights have been invaded, is to place those rights at the mercy of administrative officials and seriously to impair the security inherent in our judicial safeguards. That prospect, with our multiplication of administrative agencies, is not one to be lightly regarded. It is said that we can retain judicial authority to examine the weight of evidence when the question concerns the right of personal liberty. But if this be so, it is not because we are privileged to perform our judicial duty in that case and for reasons of convenience to disregard it in others. The

principle applies when right either of person or of property are protected by constitutional restrictions. Under our system there is no warrant for the view that the judicial power of a competent court can be circumscribed by any legislative arrangement designed to give effect to administrative action going beyond the limits of constitutional authority. This is the purport of the decisions above cited with respect to the exercise of an independent judicial judgment upon the facts where confiscation is alleged. The question under the Packers and Stockyards Act is not different from that arising under any other act, and we see no reason why those decisions should be overruled.

But this judicial duty to exercise an independent judgment does not require or justify disregard of the weight which may properly attach to findings upon hearing and evidence. On the contrary, the judicial duty is performed in the light of the proceedings already had and may be greatly facilitated by the assembling and analysis of the facts in the course of the legislative determination. Judicial judgment may be none the less appropriately independent because informed and aided by the sifting procedure of an expert legislative agency. Moreover, as the question is whether the legislative action has passed beyond the lowest limit of the permitted zone of reasonableness into the forbidden reaches of confiscation, judicial scrutiny must of necessity take into account the entire legislative process including the reasoning and findings upon which the legislative action rests. We have said that "in a question of rate-making there is a strong presumption in favor of the conclusions reached by an experienced administrative body after a full hearing." *Darnell v. Edwards*, 244 U. S. 564, 569. The established principle which guides the court in the exercise of its judgment on the entire case is that the complaining party carries the burden of making a convincing showing and that the court will not interfere with the exercise of the rate-making power unless confiscation is clearly established. *Los Angeles Gas Co. v. Railroad Commission*, 289 U. S. 287, 305; *Lindheimer v. Illinois Telephone Co.*, 292 U. S. 151, 169; *Dayton Power & Light Co. v. Public Utilities Commission*, 292 U. S. 290, 298.

A cognate question was considered in *Manufacturers Ry. Co. v. United States*, 246 U. S. 457, 470, 488-490. There, appellees insisted that the finding of the Interstate Commerce Commission upon the subject of confiscation was conclusive, or at least that it was not subject to be attacked upon evidence not presented to the Commission. We did not sustain that contention. Nevertheless, we pointed out that correct practice required that "in ordinary cases, and where the opportunity is open," all the pertinent evidence should be submitted in the first instance to the Commission. The court did not approve the course that was pursued in that case "of withholding from the Commission essential portions of the evidence that is alleged to show the rate in question to be confiscatory." And it was regarded as beyond debate that, where the Com-

mission after full hearing had set aside a given rate as unreasonably high, it would require a "clear case" to justify a court, "upon evidence newly adduced but not in a proper sense newly discovered," in annulling the action of the Commission upon the ground that the same rate was so unreasonably low as to deprive the carrier of its constitutional right of compensation. With that statement, the court turned to an examination of the evidence. The principle thus recognized with respect to the weight to be accorded to action by the Commission after full hearing applies a fortiori when the case is heard upon the record made before the Commission or, as in this case, upon the record made before the Secretary of Agriculture. It follows, in the application of this principle, that as the ultimate determination whether or not rates are confiscatory ordinarily rests upon a variety of subordinate or primary findings of fact as to particular elements, such findings made by a legislative agency after hearing will not be disturbed save as in particular instances they are plainly shown to be overborne.

As the District Court, despite its observations as to the scope of review, apparently did pass upon the evidence, making findings of its own and adopting findings of the Secretary, we do not think it necessary to remand the cause for further consideration and we turn to the other questions presented by the appeal.

[The court thereupon went into the evidence concerning valuation, income, etc., and concluded that no convincing showing had been made of confiscation.]

We conclude that the appellant has failed to prove confiscation and the decree of the district court is affirmed.

MR. JUSTICE BRANDEIS concurring. I agree that the judgment of the District Court should be affirmed; but I do so on a different ground.

The question on which I differ was put thus by the District Court: "If in a judicial review of an order of the Secretary his findings supported by substantial evidence are conclusive upon the reviewing court in every case where a constitutional issue is not involved, why are not they conclusive when a constitutional issue is involved? Is there anything in the Constitution which expressly makes findings of fact by a jury of inexperienced laymen, if supported by substantial evidence, conclusive, that prohibits Congress making findings of fact by a highly trained and especially qualified administrative agency likewise conclusive, provided they are supported by substantive evidence?" 11 F. Supp. 322, 327.

Like the lower court, I think no good reason exists for making special exception of issues of fact bearing upon a constitutional right. The inexorable safeguard which the due process clause assures is not that a court may examine whether the findings as to values or income are correct, but that the trier of the facts shall be an impartial tribunal; that no finding shall be made except upon due notice and opportunity to

be heard; that the procedure at the hearing shall be consistent with the essentials of a fair trial; and that it shall be conducted in such a way that there will be opportunity for a court to determine whether the applicable rules of law and procedure were observed.

Suits to restrain or annul an order of the Secretary of Agriculture are governed by the provision which Congress has made for reviewing orders of the Interstate Commerce Commission. *Tagg Bros. & Moorhead v. United States*, 280 U. S. 420, 432, 433, 442-444. That provision does not, in my opinion, permit a district court to set aside an order on the ground that the Secretary erred in making a finding of fact; and the jurisdiction of this court to review its judgment is necessarily subject to the same limitation. As the District Court concluded that no applicable rule of law was disregarded by the Secretary; that for his findings there was ample support in the evidence; that taken together they support his conclusion that the rates are compensatory; and that the proceeding was in no respect irregular, it was in duty bound to dismiss the bill without enquiring into the correctness of his findings of subsidiary facts.

First. An order of the Secretary may, of course, be set aside for violation of the due process clause by prescribing rates which, on the facts found, are confiscatory. For the order of an administrative tribunal may be set aside for any error of law, substantive or procedural. *Interstate Commerce Commission v. Union Pacific R. R.*, 222 U. S. 541, 547. Moreover, where what purports to be a finding upon a question of fact is so involved with and dependent upon questions of law as to be in substance and effect a decision of the latter, the court will, in order to decide the legal question, examine the entire record, including the evidence if necessary, as it does in cases coming from the highest court of a state. Compare *Kansas City Southern Ry. v. Albers Commission Co.*, 223 U. S. 573, 591; *Cedar Rapids Gas Light Co. v. Cedar Rapids*, 223 U. S. 655, 668, 669. It may set aside an order for lack of findings necessary to support it, *Florida v. United States*, 282 U. S. 194, 212-215; or because findings were made without evidence to support them, *New England Divisions Case*, 261 U. S. 184, 203; *Chicago Junction Case*, 264 U. S. 258, 262-266; or because the evidence was such "that it was impossible for a fair-minded board to come to the result which was reached," *San Diego Land & Town Co. v. Jasper*, 189 U. S. 439, 442; or because the order was based on evidence not legally cognizable, *United States v. Abilene & Southern Ry.*, 265 U. S. 274, 286-290; or because the facts and circumstances which ought to have been considered were excluded from consideration, *Interstate Commerce Commission v. Northern Pacific Ry.*, 216 U. S. 538, 544, 545; *Northern Pacific Ry. v. Department of Public Works*, 268 U. S. 39, 44; or because facts and circumstances were considered which could not legally influence the conclusion, *Interstate Commerce Commission v.*

Diffenbaugh, 222 U. S. 42, 46-47; Florida East Coast Ry. v. United States, 234 U. S. 167, 187; or because it applied a rule thought wrong for determining the value of the property, St. Louis & O'Fallon Ry. v. United States, 279 U. S. 461. These cases deal with errors of law or irregularities of procedure.

Second. The contention of the appellant is that the Secretary of Agriculture erred in making findings on which rest his conclusion that the rates prescribed are compensatory. The matters here in controversy are questions of fact—subsidiary issues, about 63 in number, bearing upon two main issues of fact: What is the "value" of the property used and useful in the business? What will be the income earned on that valuation if the prescribed rates are put into force?

By the Packers and Stockyards Act, the duty of investigating and determining the facts was committed by Congress to the Secretary. It is not disputed that ordinarily his findings made upon substantial evidence in properly conducted proceedings are conclusive. Tagg Brothers & Moorhead v. United States, 280 U. S. 420, 444. This court has consistently declared in cases arising under the Interstate Commerce Act, that to "consider the weight of the evidence is beyond our province," Western Paper Makers' Chemical Co. v. United States, 271 U. S. 268, 271; Chicago, R. I. & Pac. Ry. v. United States, 274 U. S. 29, 33, 34; and that courts have no concern with the correctness of the Commission's reasoning, with the soundness of its conclusions of fact, or with the alleged inconsistency of the findings with those made in other proceedings, Virginian Ry. v. United States, 272 U. S. 658, 663, 665, 666. Compare New York & Queens Gas Co. v. McCall, 245 U. S. 345, 348; Georgia Ry. & Power Co. v. Railroad Commission, 262 U. S. 625, 634; Silberschein v. United States, 266 U. S. 221, 225; Ma-King Co. v. Blair, 271 U. S. 479, 483.

The cases are numerous in which the attempt was made to induce this court to annul an order of the Commission for error of fact; but in every case relief was denied. See St. Louis & O'Fallon Ry. v. United States, 279 U. S. 461, 493, n. 8. In this case also, the court refuses to set aside the order. But it declares that an exception to the rule of finality must be made, because a constitutional issue is involved; and that the court, weighing the evidence, must in its independent judgment determine the correctness of the findings of fact made by the Secretary. That view finds support in Ohio Valley Water Co. v. Ben Avon Borough, 253 U. S. 287, and in general statements made in Manufacturers Ry. Co. v. United States, 246 U. S. 457, 488-490, and other cases; but it is inconsistent with a multitude of decisions in analogous cases hereafter discussed.

Third. The Fifth Amendment, like the Fourteenth, declares that property may not be taken without due process of law. But there is nothing in the text of the Constitution (including the Amendments)

which tells the reader whether to constitute due process it is necessary that there be opportunity for a judicial review of the correctness of the findings of fact made by the Secretary of Agriculture concerning the value of this property or its net income. To learn what the procedure must be in a particular situation, in order to constitute due process, we turn necessarily to the decisions of our court. These tell us that due process does not require that a decision made by an appropriate tribunal shall be reviewable by another. *Pittsburgh, etc., Ry. v. Backus*, 154 U. S. 421, 426, 427; *Reetz v. Michigan*, 188 U. S. 505, 508; *Dohany v. Rogers*, 281 U. S. 362, 369. They tell us that due process is not necessarily judicial process. *Murray's Lessee v. Hoboken Land & Improvement Co.*, 18 How. 272, 280; *McMillen v. Anderson*, 95 U. S. 37, 41; *United States v. Ju Toy*, 198 U. S. 253, 263. And they draw distinctions which give clear indication when due process requires judicial process and when it does not.

The first distinction is between issues of law and issues of fact. When dealing with constitutional rights (as distinguished from privileges accorded by the Government, *United States v. Babcock*, 250 U. S. 328, 331) there must be the opportunity of presenting in an appropriate proceeding, at some time, to some court, every question of law raised, whatever the nature of the right invoked or the status of him who claims it. The second distinction is between the right to liberty of person and other constitutional rights. Compare *Phillips v. Commissioner*, 283 U. S. 589, 596, 597. A citizen who claims that his liberty is being infringed is entitled upon habeas corpus, to the opportunity of a judicial determination of the facts. And, so highly is this liberty prized, that the opportunity must be accorded to any resident of the United States who claims to be a citizen. Compare *Ng Fung Ho v. White*, 259 U. S. 276, 282-285, with *United States v. Ju Toy*, 198 U. S. 253, and *Tang Tun v. Edsell*, 223 U. S. 673, 675. But a multitude of decisions tells us that when dealing with property a much more liberal rule applies. They show that due process of law does not always entitle an owner to have the correctness of findings of fact reviewed by a court; and that in deciding whether such review is required, "respect must be had to the cause and object of the taking, whether under the taxing power, the power of eminent domain, or the power of assessment for local improvements, or none of these; and if found suitable or admissible in the special case, it will be adjudged to be 'due process of law.'" *MR. JUSTICE BRADLEY*, in *Davidson v. New Orleans*, 96 U. S. 97, 107.

Our decisions tell us specifically that the final ascertainment of the facts regarding value or income may be submitted by Congress, or state legislatures, to an administrative tribunal, even where the constitutionality of the taking depends upon the value of the property or the amount of the net income. Thus:



(a) No taking of property by eminent domain is constitutional unless just compensation is paid. But in condemnation proceedings the value of the property, and hence the amount payable therefor, need not be determined by a court. "By the Constitution of the United States, the estimate of the just compensation for property taken for the public use, under the right of eminent domain, is not required to be made by a jury; but may be entrusted by Congress to commissioners appointed by a court or by the executive, or to an inquest consisting of more or fewer men than an ordinary jury." *Bauman v. Ross*, 167 U. S. 548, 593. In *Long Island Water Supply Co. v. Brooklyn*, 166 U. S. 685, 695, it was said that "there is no denial of due process in making findings of fact by the triers of fact, whether commissioners or a jury, final as to such facts, and leaving open to the courts simply the inquiry as to whether there was any erroneous basis adopted by the triers in their appraisal, or other errors in their proceedings." In *Crane v. Hahlo*, 258 U. S. 142, 148, the court said in applying the same rule to a statute which allowed a judicial review of the facts only in case of "lack of jurisdiction, or fraud, or wilful misconduct on the part of the members of the Board": "This afforded ample protection for the fundamental rights of the plaintiff in error, and the taking away of the right to have examined mere claims of honest error in the conduct of the proceeding by the Board did not invade any federal constitutional right." See also, *United States v. Jones*, 109 U. S. 513, 519; *Backus v. Fort Street Union Depot Co.*, 169 U. S. 557, 569.

(b) No taking of property by taxation is constitutional unless the exaction is laid according to value, income or other measure prescribed by law. But Congress has, with the sanction of this court, broadly given finality to the determination by the Board of Tax Appeals of the facts concerning income. By its legislation the jurisdiction of courts is limited to deciding "whether the correct rule of law was applied to the facts found; and whether there was substantial evidence before the Board to support the findings made." *Helvering v. Rankin*, 295 U. S. 123, 131; *Old Mission Portland Cement Co. v. Helvering*, 293 U. S. 289, 294. Compare *Cheatham v. United States*, 92 U. S. 85, 88, 89. No court may pass upon the correctness in fact of any finding of the Board.

(c) The due process clause is not violated by giving in tariff acts finality to the valuations made by appraisers of imported merchandise belonging to American citizens. *Hilton v. Merritt*, 110 U. S. 97, 107. "It was certainly competent for Congress," said the court in *Passavant v. United States*, 148 U. S. 214, 219, "to create this board of general appraisers, called 'legislative referees' in an early case in this court (*Rankin v. Hoyt*, 4 How. 327, 335), and not only invest them with authority to examine and decide upon the valuation of imported goods, when that question was properly submitted to them, but to declare

that their decision 'shall be final and conclusive as to the dutiable value of such merchandise against all parties interested therein.'"

(d) The due process clause is not violated by legislation which requires a fire insurance policy to provide that the amount of the loss (and hence values) shall be determined by a board of appraisers, and that their decision, if not grossly excessive, or inadequate, or procured by fraud, shall be conclusive as to the amount of the loss. *Hardware Dealers Mutual Fire Ins. Co. v. Glidden Co.*, 284 U. S. 151.

(e) The due process clause is not violated by giving finality to assessments of value made for the purpose of ad valorem taxation, although in those proceedings the opportunity for a hearing is far less ample than under the statute here in question. Compare *State Railroad Tax Cases*, 92 U. S. 575, 610; *Kentucky Railroad Tax Cases*, 115 U. S. 321; *King v. Mullins*, 171 U. S. 404, 429-431.

As we said in *San Diego Land & Town Co. v. Jasper*, 189 U. S. 439, 446: "We do not sit as a general appellate board of revision for all rates and taxes in the United States"; in *Coulter v. Louisville & Nashville R. R.*, 196 U. S. 599, 607: "Of course, no court would venture to intervene merely on the ground of a mistake of judgment on the part of the officer to whom the duty of assessment was entrusted by the law."

Answering the suggestion of possible error in the final action of a board in valuing and assessing railroad property, the court said in *Kentucky Railroad Tax Cases*, 115 U. S. 321, 335: "Such possibilities are but the necessary imperfections of all human institutions, and do not admit of remedy; at least no revisory power to prevent or redress them enters into the judicial system, for, by the supposition, its administration is itself subject to the same imperfections." In *Crane v. Hahlo*, 258 U. S. 142, 148, the court intimating that even judges may err in their determinations of fact, held that legislators might, in proceeding for the taking of property, act on "the policy that the greater good is sometimes served by making certain classes of decisions final and ending litigation, even though in a particular case the individual is prevented by review from correcting some error which has injured him."

These cases show that in deciding when, and to what extent, finality may be given to an administrative finding of fact involving the taking of property, the court has refused to be governed by a rigid rule. It has weighed the relative values of constitutional rights, the essentials of powers conferred, and the need of protecting both. It has noted the distinction between informal, summary administrative action based on *ex parte* casual inspection or unverified information, where no record is preserved of the evidence on which the official acted, and formal, deliberate *quasi-judicial* decisions of administrative tribunals based on findings of fact expressed in writing, and made after hearing evidence and argument under the sanctions and the safeguards attending judi-

cial proceedings. It has considered the nature of the facts in issue, the character of the relevant evidence, the need in the business of government for prompt final decision. It has recognized that there is a limit to the capacity of judges; and that the magnitude of the task imposed upon them, if there be granted judicial review of the correctness of findings of such facts as value and income, may prevent prompt and faithful performance. It has borne in mind that even in judicial proceedings the finding of facts is left, by the Constitution, in large part to laymen. It has enquired into the character of the administrative tribunal provided and the incidents of its procedure. Compare *Humphrey's Executor v. United States*, 295 U. S. 602, 628. And where that prescribed for the particular class of takings appeared "appropriate to the case, and just to the parties to be affected," and "adapted to the end to be attained," *Hagar v. Reclamation District*, 111 U. S. 701, 708, the court has held it constitutional to make the findings of fact of the administrative tribunal conclusive. Thus, the court has followed the rule of reason.

Fourth. Congress concluded that to give finality to the findings of the Secretary of Agriculture of the facts as to value and income is essential to the effective administration of the Packers and Stockyards Act. The *Ben Avon* case, and the statements in *Manufacturers Ry. Co. v. United States*, and casual references in other cases, should not lead us to graft upon the rule discussed, and so widely applied to other takings, a disabling exception applicable to rate cases. In none of the rate cases relied upon was there any reason given for denying to Congress that power; nor was there mention of the many decisions in which the power to prescribe finality was upheld. In none was there noted the distinction between challenging the correctness of findings of fact on which rest the conclusion as to confiscation, and challenging the conclusion of law as to confiscation on facts found. Here, some reasons have been offered in support of making the exception; but no reason given seems to me sound.

(a) It is urged that since Congress did not, and could not, delegate to the Secretary authority to prescribe a confiscatory rate, the facts in issue are jurisdictional and, hence, the court must have power to review them. But, as was said in *Oklahoma Operating Co. v. Love*, 252 U. S. 331, 336: "The challenge of a prescribed rate, as being confiscatory raises a question not as to the scope of the Commission's authority, but of the correctness of the exercise of its judgment." Therefore, *Crowell v. Benson*, 285 U. S. 22, has no application here.

(b) It is said that, since regulating rates is legislation, courts must have the same power to review facts which they possess in passing on the constitutionality of statutes—otherwise the supremacy of law could be impaired by delegation to an administrative tribunal of a power to make final determinations that the legislature lacks. To that argument there

are several answers. It fails to note that a rate order may be complained of as being confiscatory, not because of error in a finding of value or income, but because the regulating body has, in reaching its conclusions, ignored established principles or incontestable facts, or been guilty of dishonesty or of other irregularity in the proceeding. Whenever a legislative body regulates a subject within the scope of its power, a presumption of constitutionality prevails, in the absence of some factual foundation of record for overthrowing the regulation, *O'Gorman & Young v. Hartford Fire Insurance Co.*, 282 U. S. 251, 257, 258; and this rule extends to such action by an administrative body. *Pacific States Box & Basket Co. v. White*, 296 U. S. 176, 185, 186. If there be in the record conflicting evidence as to the facts assumed, a court may not substitute its independent judgment for that of the legislative body. Mere denial of facts relied upon as conditioning the validity of legislation does not confer upon a court authority to decide what is called the truth; that is, the absolute existence in reality of facts alleged. "Where the constitutional validity of a statute depends upon the existence of facts, courts must be cautious about reaching a conclusion respecting them contrary to that reached by the legislature; and if the question of what the facts established be a fairly debatable one, it is not permissible for the judge to set up his opinion in respect of it against the opinion of the law-maker." *Radice v. New York*, 246 U. S. 292, 294. Here, the court's duty is to determine merely whether there was evidence upon which reasonable men could have found as the Secretary did, with regard to value and income. Obviously the case at bar is not one in which "it was impossible for a fair-minded board to come to the result which was reached." Compare *Van Dyke v. Geary*, 244 U. S. 39, 48-49.

Moreover, argument based on the analogy of the review of statutes fails to note the distinction between determinations of fact made in a *quasi-judicial* proceeding surrounded by all the safeguards which attend trials by a court, and assumptions, or conclusions, as to facts made by a legislature on information which lacks those safeguards. It fails to note also the subsidiary character of the issue involved in a finding of value or income; and that it is only as to these subsidiary issues that finality of the finding is asserted here.

The supremacy of law demands that there shall be opportunity to have some court decide whether an erroneous rule of law was applied; and whether the proceeding in which facts were adjudicated was conducted regularly. To that extent, the person asserting a right, whatever its source, should be entitled to the independent judgment of a court on the ultimate question of constitutionality. But supremacy of law does not demand that the correctness of every finding of fact to which the rule of law is to be applied shall be subject to review by a court. If it did, the power of courts to set aside findings of fact by an adminis-

trative tribunal would be broader than their power to set aside a jury's verdict. The Constitution contains no such command.

Fifth. The history of this case illustrates that regulation cannot be effective unless the legality of the rates prescribed may, if contested, be determined with reasonable promptness. . . .

[MR. JUSTICE BRANDEIS thereupon describes the history of this case as well as other rate cases, notably the Chicago and New York Telephone cases, in order to show how protracted are the proceedings under current theories of constitutional requirements.] . . .

Eighth. In deciding whether the Constitution prevents Congress from giving finality to findings as to value or income where confiscation is alleged, the court must consider the effect of our decisions not only upon the function of rate-regulation, but also upon the administrative and judicial tribunals themselves. Responsibility is the great developer of men. May it not tend to emasculate or demoralize the rate-making body if ultimate responsibility is transferred to others? To the capacity of men there is a limit. May it not impair the quality of the work of the courts if this heavy task of reviewing questions of fact is assumed?

The obstacles encountered in the case at bar and in the regulation of the rates of the large utilities are attributable, in the main, to the court's adherence to the rule declared in *Smyth v. Ames* for determining the value of the property. In *Missouri ex rel. Southwestern Bell Telephone Co. v. Public Service Commission*, 262 U. S. 276, 289, I stated my reasons for believing that the Constitution did not require the court to adopt that rule which so seriously impairs the power of rate-regulation. But since the decision of *Smyth v. Ames* is adhered to, there is the greater need of applying to cases in which rate-regulation is alleged to be confiscatory the rule of reason under which the court has sanctioned, in other cases of taking, the legislative provision giving finality to *quasi-judicial* findings of value and income by administrative tribunals. . . .

I cannot believe that the Constitution, which confers upon Congress the power of rate-regulation, denies to it power to adopt measures indispensable to its effective exercise.<sup>8</sup>

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<sup>8</sup> The extent to which the administrative determination of fact issues involving constitutional rights should be reversible in the courts has been debated pro and con in legal literature.

There is certainly no categorical answer to the question as to whether or not constitutional fact determinations should be reviewed and reversed if found contrary to the weight of the evidence. To illuminate the question one should ask and if possible answer such inquiries as: Does the history of the doctrine of separation of powers and its corollaries demand judicial supremacy in these matters? Should a distinction be drawn between legislative action and judicial action by administrative tribunals, according a different degree of finality to the one than to the other? Does due process of law either logically or historically dictate a plenary doctrine of review? Will judicial review of the facts

**Railroad Commission of Texas v. Rowan & Nichols Oil Co., Supreme Court of the United States, 1940. 310 U. S. 573, 84 L. Ed. 1368, 60 S. Ct. 1021.**

Suit by the Rowan & Nichols Oil Company against the Railroad Commission of Texas and others, to enjoin enforcement of an oil proration order as against plaintiff's wells. . . .

MR. JUSTICE FRANKFURTER delivered the opinion of the court.

The question before us is the validity when challenged by appeal to the Fourteenth Amendment, of an oil proration order promulgated by the Railroad Commission of Texas, insofar as it applies to the respondent's wells.

To safeguard its oil resources Texas has devised a regulatory scheme for their production, and has placed its administration in the Railroad Commission's hands. Revised Civil Statutes, Art. 6014 et seq., Vernon's Ann. Civ. St. Art. 6014 et seq. In conformity with this statute, which has familiar procedural provision, the Commission in the fall of 1938 issued the assailed proration order covering the East Texas oil field, where respondent's wells are located. By this order each well was allowed to produce 2.32% of its "hourly potential"—that is, 2.32% of its hourly productive capacity under unrestricted flow. But the practical operation of this order was largely cut across by allowances made to "marginal wells." These are wells which, if their low productive capacity were legally curtailed, would have to be prematurely abandoned. Therefore the Texas statute gives them a special status. In accord with its policy toward these marginal wells, the Commission freed them from the burden of its hourly potential formula by allowing them production up to twenty barrels a day. Because of the large number of these low capacity units in the East Texas field, approximately 385,000 barrels out of a total daily "allowable" of 522,000 barrels were exempt from the restricting formula, leaving only about 136,000 for the class within which respondent's wells fell. Application to them of the hourly potential formula resulted in an allotment of only

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in such cases work satisfactorily in practice, or will it result in a breakdown of administrative directing powers at this point? Will property interests be so severely prejudiced by the absence of judicial review as seriously to impair values? In the long run the scope of judicial review of constitutional fact determinations will be fixed by reference to the greatest good to the greatest number. In this connection which of the several interests involved are the predominant ones?

Attention should be called to the fact that under the theory of the Ohio Valley Water Company case, and also the more recent St. Joseph Stock Yards case, it does not follow that the court *must* review the weight of the evidence in each instance. It is only necessary that there be the *opportunity* to engage in such review. It remains within the power of the court to *actually* accord such weight to the findings of the administrative tribunal as the integrity and ability of the tribunal warrants. See 25 Mich. L. Rev. 273 (1927).

about twenty-two barrels a day to each well. Claiming that such a mode of regulation disregarded its right to the oil in place beneath its leases, respondent sought and obtained a decree from the District Court for the Eastern District of Texas enjoining the Commission from carrying its proration plan into effect. 28 F. Supp. 131. With modification not here relevant the Circuit Court of Appeals affirmed the decree. 107 F. 2d 70. We brought the case here by certiorari, 309 U. S. 646, because of the importance of the matter in the administration of the Texas law and kindred conservation statutes.

As sustained by the findings of the District Court and accepted by the Circuit Court of Appeals, respondent's claims may be summarized by what follows: The Commission's proration formula as applied permits other leaseholders, more leniently treated, to capture oil at a more rapid rate than is possible for the respondent, thereby draining away oil which underlies respondent's leased lands. This is due both to the allocating formula itself, and more especially to the permission granted marginal wells to produce without limit up to twenty barrels a day. The "potential" method of allocation fails to give sufficient weight to relevant factors in the measurement of oil in place, especially to the depth of respondent's reserves situated in the "Fairway," a deep and rich portion of the East Texas field. Only an allocation based upon acre-feet of sand or its equivalent would be a reasonable means of measuring the oil in place beneath respondent's leases; and any formula failing to do this takes respondent's property without due process of law. Moreover, the allowance made to marginal wells absorbs so much of the total "allowable" as to make the Commission's order in effect an allocation on a flat per well basis, regardless of the great variation in the capacity of the wells and the density with which different leases have been drilled. An important factor in producing this result is the permission frequently granted by the Commission, under power conferred upon it by statute, for departure from its spacing and drilling rules whereby the field has been drilled with an irregular density. As a consequence, the more densely drilled tracts adjoining respondent's leases may, by virtue of their marginal allowances, produce oil in such quantities as to drain away respondent's reserves. Such is the basis for respondent's resistance to the order.

Underlying these claims is as thorny a problem as has challenged the ingenuity and wisdom of legislatures. In major part it was created by the discovery of vast oil resources and by their development under rules of law fashioned in the first instance by courts on the basis of analogies drawn from other fields of the common law. In Texas, according to conventional doctrine, the holder of an oil lease "owns" the oil in place beneath the surface. *Lemar v. Garner*, 121 Tex. 502; 50 S. W. 2d 769; *Stephens County v. Mid-Kansas Oil & Gas Co.*, 113 Tex. 160; 254 S. W.

290; 1 Summers, Oil and Gas (2nd ed.), p. 16. But equally recognized is the "rule of capture" which subjects the lessee's interest to his neighbors' power to drain his oil away. Therefore, to speak of ownership in its relation to oil, is to imply a contingency of control not applicable to ordinary interests in realty. See Ely, The Conservation of Oil, 51 Harv. L. Rev. 1209, 1218-22. Each leaseholder, that is to say, is at the mercy of all those who adjoin him, since oil is a fugacious mineral, the movements of which are not confined by the artificial boundaries of surface tracts. This gap between the geological nature of the oil pool and the formal surface rights of the lessees is frequently bridged by the drilling of "offset wells" at the boundary of each surface tract, so that owners may protect themselves against the exercise of one another's capture rights. Partly to mitigate the undesirable consequences of this unsystematized development, the oil-producing states, Texas among them, have enacted conservation laws with appropriate administrative mechanisms to control drilling and production. The general scheme of the Texas statute is not challenged. Its constitutionality is here settled. *Champlin Refining Co. v. Commission*, 286 U. S. 210.

But merely writing laws is only the beginning of the matter. The administration of these laws is full of perplexities. State agencies have encountered innumerable difficulties in trying to adjust the many conflicting interests which grow out of the rule of capture and its implications. The experience of Texas illustrates that a brood of litigation almost inevitably follows the inherent empiricism of these attempted solutions. See Ely, *op. cit.* supra, at pp. 1225-29; Marshall and Meyers, The Legal Planning of Petroleum Production; Two Years of Proration, 42 Yale L. J. 701. For some years the Texas Commission has been engaged in experimental endeavor to devise appropriate formulas for a fair allotment of the allowable production. The commitment of such a delicate task to the administrative process has not escaped challenge in the courts, and at times the challenge has been successful. Compare *Mac-Millan v. Railroad Commission*, 51 F. 2d 400; *Constantin v. Smith*, 57 F. 2d 227; *Peoples' Petroleum Producers v. Smith*, 1 F. Supp. 361; *Amazon Petroleum Corp. v. Railroad Commission*, 5 F. Supp. 633. But such cases are only episodes in the evolution of adjustment among private interests and in the reconciliation of all these private interests with the underlying public interest in such a vital source of energy for our day as oil. Certainly so far as the federal courts are concerned the evolution of these formulas belongs to the Commission and not to the judiciary. [Except where the jurisdiction rests, as it does not here, on diversity of citizenship, the only question open to a federal tribunal is whether the state action complained of has transgressed whatever restrictions the vague contours of the Due Process Clause may place



upon the exercise of the state's regulatory power.]<sup>9</sup> A controversy like this always calls for fresh reminder that courts must not substitute their notions of expediency and fairness for those which have guided the agencies to whom the formulation and execution of policy have been entrusted.

General as these considerations may be, they are decisive of the present case. Both the District Court and the Circuit Court of Appeals appear to have been dominated by their own conception of fairness and reasonableness of the challenged order. For all we know, the judgment of these two lower courts may have been wiser than that of the Commission, and their standard of fairness a better one. But whether a system of proration based upon hourly potential is as fair as one based upon estimated recoverable reserves or some other factor or combination of factors, is in itself a question for administrative and not judicial judgment. According to the Commission's experts, theories of allocation urged by the respondent and accepted by the courts below would in fact give to respondent more than its fair share of the oil in the field. Respondent, the Commission's witnesses contend, would gain undue benefit from the constant eastward migrations of oil caused by the gradual influence of subsurface pressure gradients—and this at the expense of other lessees in geologically less fortunate portions of the field. The Commission's experts further insisted that, though much technical progress has been made, estimates of recoverable reserves beneath the surface of a particular tract remain largely an indeterminate venture; and that hourly potential actually takes into account, at least in some measure, all relevant factors for ascertaining recoverable reserves. Certainly in a domain of knowledge still shifting and growing, and in a field where judgment is therefore necessarily beset by the necessity of inferences bordering on conjecture even for those learned in the art, it would be presumptuous for courts, on the basis of conflicting expert testimony, to deem the view of the administrative tribunal, acting under legislative authority, offensive to the Fourteenth Amendment. Compare *South Carolina Highway Dept. v. Barnwell Bros.*, 313 U. S. 177, 191, et seq.

Equally enmeshed in a conflict of *expertise* is the claim most vigorously urged by respondent that, taken in connection with exceptions made by the Commission to its spacing rules and with the unrestricted twenty barrel allowance to marginal wells, the proration order substantially places production on a flat per well basis. Such a result, according to respondent's claim as accepted by the lower courts, gives a constitutionally inadmissible advantage to smaller and more densely drilled

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<sup>9</sup> The sentence in brackets was subsequently ordered stricken from the opinion. See *Railroad Commission of Texas v. Rowan & Nichols Oil Co.*, 311 U. S. 614, 85 L. Ed. 390, 61 S. Ct. 66 (1940).

tracts as against those owned by respondent. But this claim really presents a more specialized aspect of the general problem. In regulating flow of production the treatment to be accorded to small and irregularly shaped tracts which do not fit neatly into the Commission's general scheme for spacing, has presented a difficulty almost as great as the framing of proration formulas. Compare Walker, *The Problem of the Small Tract under Spacing Regulations*, 17 Tex. L. Rev. 157 (Supp. Bar Association Proceedings). To deny the holders of these tracts permission to drill might subject them to the risk of losing their oil in place or of being put at the mercy of adjoining holders. In many instances, therefore, the Commission has granted exceptions to its general spacing rule on the basis of which investments have been made and wells drilled. If these wells, most of them small, were restricted to production on the basis of an hourly potential formula, it might be unprofitable to operate them at all. Not only are the individual interests of these small operators involved, but their effect on the state's economy is an appropriate factor to be taken into account when plans are devised to keep the wells open.

A flat per well allowance to these producers was not an unnatural answer to the problem. Whether, as contended by the respondent, the maximum figure set by the Commission is too high in that it leads to the capture of oil from beneath its leases by neighboring operators, and whether a lower limit might suffice to assure profitable production—these questions take us into that debatable territory which it is not the province of federal courts to enter. The record is redolent with familiar dogmatic assertions by experts equally confident of contradictory contentions. These touch matters of geography and geology and physics and engineering. No less is there conflict in the evidence as to the solidity of respondent's apprehension that there will be drainage of the oil beneath its surface by neighboring wells. The Commission's experts insist that the threat, if existent at all, is speculative, and that the Commission's power of continuous oversight is readily available for relief if real danger should arise in the future.

Plainly these are not issues for our arbitrament. The state was confronted with its general problem of proration and with the special relation to it of the small tracts in the particular configuration of the East Texas field. It has chosen to meet these problems through the day-to-day exertions of a body specially entrusted with the task because presumably competent to deal with it. In striking the balances that have to be struck with the complicated and subtle factors that must enter into such judgments, the Commission has observed established procedure. If the history of proration is any guide, the present order is but one more item in a continuous series of adjustments. It is not for the federal courts to supplant the Commission's judgment even in

the face of convincing proof that a different result would have been better.

The challenged decree must therefore be  
Reversed.

MR. JUSTICE ROBERTS, dissenting. The petitioners' proration order is challenged not merely as unfair or unreasonable but as confiscatory of the respondent's property. Upon the allegations of the bill, the District Court had jurisdiction. Although the problem of proration presented technical and difficult questions, and although the Commission was vested with a broad discretion in dealing with them, these facts could not justify the court's abdicating its jurisdiction to test the Commission's order. The case was tried *de novo* and neither the full record made before the Commission nor its findings appear in the evidence, except for what is contained in the Commission's orders. After a painstaking trial, and upon detailed and well supported findings of fact, the court reached the conclusion that the order worked a confiscation of respondent's property. The court said: "The respondents' (petitioners') engineers frankly admitted that the present scheme of proration is nothing more or less than one on a per well basis." Referring to such a basis, the court added: "It is sufficient to say that it takes no account of the difference in the wells, of the richness or thickness of the sand, of the location upon the structure, of the porosity or permeability of the sand, of the estimated oil reserves, or of the acreage upon which the respective wells are situated. The worst property is raised to the level of the best and the best is lowered to the level of the worst." The court concluded that the order operated to appropriate, for the benefit of others, the respondent's oil without compensation.

The Circuit Court of Appeals approved and adopted the findings and conclusions of the District Court.

The opinion of this court, in my judgment, announces principles with respect to the review of administrative action challenged under the due process clause directly contrary to those which have been established. A recent exposition of the applicable principles is found in the opinion of MR. JUSTICE BRANDEIS, written for a unanimous court, in *Thompson v. Consolidated Gas Utilities Corp.*, 300 U. S. 55, dealing with a proration order affecting gas, entered by the same commission which entered the order here in issue. I think that adherence to the principles there stated requires the affirmance of the decree.

The CHIEF JUSTICE and MR. JUSTICE McREYNOLDS join in this opinion.<sup>10</sup>

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<sup>10</sup> Pursuant to a subsequent opinion rendered in *Railroad Commission of Texas v. Rowan & Nichols Oil Co.*, 311 U. S. 614, 85 L. Ed. 390, 61 S. Ct. 66 (1940) the following paragraph was added to the opinion in the above reported case.

"While the presence of a federal question may also open up state issues, Siler

**National Labor Relations Board v. Hearst Publications, Inc., Supreme Court of the United States, 1944. 322 U. S. 111, 88 L. Ed. 1170, 64 S. Ct. 851.**

MR. JUSTICE RUTLEDGE delivered the opinion of the court.

These cases arise from the refusal of respondents, publishers of four Los Angeles daily newspapers, to bargain collectively with a union representing newsboys who distribute their papers on the streets of that city. Respondents' contention that they were not required to bargain because the newsboys are not their "employees" within the meaning of that term in the National Labor Relations Act, 49 Stat. 450, 29 USC § 152, presents the important question which we granted certiorari to resolve.

The proceedings before the National Labor Relations Board were begun with the filing of four petitions for investigation and certification

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v. Louisville & N. R. R., 213 U. S. 175, 53 L. Ed. 753, 29 S. Ct. 451, the claim here founded on Texas law is derived from a statute requiring proration on a 'reasonable basis.' Vernon's Texas Annotated Civil Statutes, art. 6049c, para. 7. The Texas decisions, insofar as they have been brought to our attention, do not make clear whether the local courts may exercise an independent judgment on what is 'reasonable.' Compare *Brown v. Humble Oil & Refining Co.*, 126 Tex. 296, 316, 83 S. W. 2d 935, 87 S. W. 2d 1069, 99 A. L. R. 1107, 101 A. L. R. 1393. But, in any event, as we read the Texas cases, the standard of 'reasonable basis' under the statute opens up the same range of inquiry as the respondent in effect asserted to exist in his claims under the Due Process Clause. These latter claims we have found untenable. What ought not to be done by the federal courts when the Due Process Clause is invoked ought not to be attempted by these courts under the guise of enforcing a state statute. Whether the respondent may still have a remedy in the state courts is for the Texas courts to determine, and is not foreclosed by the denial, on the grounds we have indicated, of the extraordinary relief of an injunction in the federal courts."

A year after the first decision was rendered in the principal case the issue was again presented to the United States Supreme Court, this time on a second order of the Railroad Commission, modifying in certain respects the provisions of the order involved in the earlier case. The Supreme Court reaffirmed its earlier position. *Railroad Commission of Texas v. Rowan & Nichols Oil Co.*, 311 U. S. 570, 85 L. Ed. 358, 61 S. Ct. 343 (1941).

For brief comments on the Rowan and Nichols case, see 39 Mich. L. Rev. 438 (1941); 26 Wash. Univ. L. Q. 265 (1941); 51 Yale L. Jour. 680 (1942).

For an extended and detailed examination of the procedures of the Texas Railroad Commission, see Davis and Willbern, "Administrative Control of Oil Production in Texas," 22 Tex. L. Rev. 149 (1944). For complete discussion of the Rowan and Nichols case and conflicting views concerning it, see Summers, "Does the Regulation of Oil Production Require the Denial of Due Process and the Equal Protection of the Laws?" 19 Tex. L. Rev. 1 (1940); also Davis, "Judicial Emasculation of Administrative Action and Oil Proration: Another View," 19 Tex. L. Rev. 29 (1940); and Hardwicke, "Oil Conservation: Statutes, Administration and Court Review," 13 Miss. L. Jour. 381 (1941).

The Rowan and Nichols case should be viewed in the light of the court's more recent pronouncement in *Alabama Public Service Commission v. Southern Ry. Co.*, supra, Chapter VIII.

by Los Angeles Newsboys Local Industrial Union No. 75. Hearings were held in a consolidated proceeding after which the Board made findings of fact and concluded that the regular full-time newsboys selling each paper were employees within the Act and that questions affecting commerce concerning the representation of employees had arisen. It designated appropriate units and ordered elections. 28 N. L. R. B. 1006. At these the union was selected as their representative by majorities of the eligible newsboys. After the union was appropriately certified, 33 N. L. R. B. 941, 36 N. L. R. B. 285, the respondents refused to bargain with it. Thereupon proceedings under Section 10, 49 Stat. 453-455, 29 USC para. 160, were instituted, a hearing was held and respondents were found to have violated Sections 8 (1) and 8 (5) of the Act, 49 Stat. 452-453, 29 USC para. 158 (1), (5). They were ordered to cease and desist from such violations and to bargain collectively with the union upon request. 39 N. L. R. B. 1245, 1256.

Upon respondents' petitions for review and the Board's petitions for enforcement, the Circuit Court of Appeals, one judge dissenting, set aside the Board's orders. Rejecting the Board's analysis, the court independently examined the question whether the newsboys are employees within the Act, decided that the statute imports common-law standards to determine that question, and held the newsboys are not employees. 136 F. 2d 608. . . .

The principal question is whether the newsboys are "employees." Because Congress did not explicitly define the term, respondents say its meaning must be determined by reference to common-law standards. In their view "common-law standards" are those the courts have applied in distinguishing between "employees" and "independent contractors" when working out various problems unrelated to the Wagner Act's purposes and provisions.

The argument assumes that there is some simple, uniform and easily applicable test which the courts have used, in dealing with such problems, to determine whether persons doing work for others fall in one class or the other. Unfortunately this is not true. Only by a long and tortuous history was the simple formulation worked out which has been stated most frequently as "the test" for deciding whether one who hires another is responsible in tort for his wrongdoing. But this formula has been by no means exclusively controlling in the solution of other problems. And its simplicity has been illusory because it is more largely simplicity of formulation than of application. Few problems in the law have given greater variety of application and conflict in results than the cases arising in the borderland between what is clearly an employer-employee relationship and what is clearly one of independent, entrepreneurial dealing. This is true within the limited field of determining vicarious liability in tort. It becomes more so when the field is expanded to include all of the possible applications of the distinction.

It is hardly necessary to stress particular instances of these variations or to emphasize that they have arisen principally, first, in the struggle of the courts to work out common-law liabilities where the legislature has given no guides for judgment, more recently also under statutes which have posed the same problem for solution in the light of the enactment's particular terms and purposes. It is enough to point out that, with reference to an identical problem, results may be contrary over a very considerable region of doubt in applying the distinction, depending upon the state or jurisdiction where the determination is made; and that within a single jurisdiction a person who, for instance, is held to be an "independent contractor" for the purpose of imposing vicarious liability in tort may be an "employee" for the purposes of particular legislation, such as unemployment compensation. See, e. g., *Globe Grain & Milling Co. v. Industrial Commission*, 98 Utah 36. In short, the assumed simplicity and uniformity, resulting from application of "common-law standards," does not exist.

Mere reference to these possible variations as characterizing the application of the Wagner Act in the treatment of persons identically situated in the facts surrounding their employment and in the influences tending to disrupt it, would be enough to require pause before accepting a thesis which would introduce them into its administration. This would be true, even if the statute itself had indicated less clearly than it does the intent they should not apply.

Two possible consequences could follow. One would be to refer the decision of who are employees to local state law. The alternative would be to make it turn on a sort of pervading general essence distilled from state law. Congress obviously did not intend the former result. It would introduce variations into the statute's operation as wide as the differences the forty-eight states and other local jurisdictions make in applying the distinction for wholly different purposes. Persons who might be "employees" in one state would be "independent contractors" in another. They would be within or without the statute's protection depending not on whether their situation falls factually within the ambit Congress had in mind, but upon the accidents of the location of their work and the attitude of the particular local jurisdiction in casting doubtful cases one way or the other. Persons working across state lines might fall in one class or the other, possibly both, depending on whether the Board and the courts would be required to give effect to the law of one state or of the adjoining one, or to that of each in relation to the portion of the work done within its borders.

Both the terms and the purposes of the statute, as well as the legislative history, show that Congress had in mind no such patchwork plan for securing freedom of employees' organization and of collective bargaining. The Wagner Act is federal legislation, administered by a national agency, intended to solve a national problem on a national scale.

Cf. e. g., Sen. Rep. No. 573, 74th Cong., 1st Sess. 2-4. It is an Act, therefore, in reference to which it is not only proper, but necessary for us to assume, "in the absence of a plain indication to the contrary, that Congress . . . is not making the application of the federal act dependent on state law." *Jerome v. United States*, 318 U. S. 101, 104. Nothing in the statute's background, history, terms or purposes indicates its scope is to be limited by such varying local conceptions, either statutory or judicial, or that it is to be administered in accordance with whatever different standards the respective states may see fit to adopt for the disposition of unrelated, local problems. Consequently, so far as the meaning of "employee" in this statute is concerned, "the federal law must prevail no matter what name is given to the interest or right by state law." *Morgan v. Commissioner*, 309 U. S. 78, 81; cf. *National Labor Relations Board v. Blount*, 131 F. 2d 585 (C. C. A.).

Whether, given the intended national uniformity, the term "employee" includes such workers as these newsboys must be answered primarily from the history, terms and purposes of the legislation. The word "is not treated by Congress as a word of art having a definite meaning. . . ." Rather "it takes color from its surroundings . . . (in) the statute where it appears," *United States v. American Trucking Associations, Inc.*, 310 U. S. 534, 545, and derives meaning from the context of that statute, which "must be read in the light of the mischief to be corrected and the end to be attained." *South Chicago Coal & Dock Co. v. Basset*, 309 U. S. 251, 259; cf. *New Negro Alliance v. Sanitary Grocery Co.*, 303 U. S. 552; *Milk Wagon Drivers' Union Local No. 753 v. Lake Valley Farm Products, Inc.*, 311 U. S. 91.

Congress, on the other hand, was not thinking solely of the immediate technical relation of employer and employee. It had in mind at least some other persons than those standing in the proximate legal relation of employee to the particular employer involved in the labor dispute. It cannot be taken, however, that the purpose was to include all other persons who may perform service for another or was to ignore entirely legal classifications made for other purposes. . . .

The mischief at which the Act is aimed and the remedies it offers are not confined exclusively to "employees" within the traditional legal distinctions separating them from "independent contractors." Myriad forms of service relationship, with infinite and subtle variations in the terms of employment, blanket the nation's economy. Some are within this Act, others beyond its coverage. Large numbers will fall clearly on one side or on the other, by whatever test may be applied. But intermediate there will be many, the incidents of whose employment partake in part of the one group, in part of the other in varying proportions of weight. And consequently the legal pendulum, for purposes of applying the statute, may swing one way or the other, depending upon the weight of this balance and its relation to the special purpose at hand.

Unless the common-law tests are to be imported and made exclusively controlling without regard to the statute's purposes, it cannot be irrelevant that the particular workers in these cases are subject, as a matter of economic fact, to the evils the statute was designed to eradicate and that the remedies it affords are appropriate for preventing them or curing their harmful effects in the special situation. Interruption of commerce through strikes and unrest may stem as well from labor disputes between some who, for other purposes, are technically "independent contractors" and their employers as from disputes between persons who, for those purposes, are "employees" and their employers. Cf. *Milk Wagon Drivers' Union Local No. 753 v. Lake Valley Farm Products, Inc.*, 311 U. S. 91. Inequality of bargaining power in controversies over wages, hours and working conditions may as well characterize the status of the one group as of the other. The former, when acting alone, may be as "helpless in dealing with an employer," as "dependent . . . on his daily wage" and as "unable to leave the employ and to resist arbitrary and unfair treatment" as the latter. For each, "union . . . (may be) essential to give . . . opportunity to deal on equality with their employer." And for each, collective bargaining may be appropriate and effective for the "friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions." 49 Stat. 449. In short, when the particular situation of employment combines these characteristics, so that the economic facts of the relation make it more nearly one of employment than of independent business enterprise with respect to the ends sought to be accomplished by the legislation, those characteristics may outweigh technical legal classification for purposes unrelated to the statute's objectives and bring the relation within its protections. . . .

It is not necessary in this case to make a completely definitive limitation around the term "employee." That task has been assigned primarily to the agency created by Congress to administer the Act. Determination of "where all the conditions of the relation require protection" involves inquiries for the Board charged with this duty. Everyday experience in the administration of the statute gives it familiarity with the circumstances and backgrounds of employment relationships in various industries, with the abilities and needs of the workers for self organization and collective action, and with the adaptability of collective bargaining for the peaceful settlement of their disputes with their employers. The experience thus acquired must be brought frequently to bear on the question who is an employee under the Act. Resolving that question, like determining whether unfair labor practices have been committed, "belongs to the usual administrative routine" of the Board. *Gray v. Powell*, 314 U. S. 402, 411. Cf. *National Labor Relations Board v. Standard Oil Co.*, 138 F. 2d 885, 887-888.



In making that body's determinations as to the facts in these matters conclusive, if supported by evidence, Congress entrusted to it primarily the decision whether the evidence establishes the material facts. Hence in reviewing the Board's ultimate conclusions, it is not the court's function to substitute its own inferences of fact for the Board's, when the latter have support in the record. *National Labor Relations Board v. Nevada Consolidated Copper Corp.*, 316 U. S. 105; cf. *Walker v. Alt-meyer*, 137 F. 2d 531 (C. C. A.). Undoubtedly questions of statutory interpretation, especially when arising in the first instance in judicial proceedings, are for the courts to resolve, giving appropriate weight to the judgment of those whose special duty is to administer the questioned statute. *Norwegian Nitrogen Products Co. v. United States*, 288 U. S. 294; *United States v. American Trucking Associations, Inc.*, 310 U. S. 534. But where the question is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially, the reviewing court's function is limited. Like the commissioner's determination under the Longshoremen's & Harbor Workers' Act, that a man is not a "member of a crew" (*South Chicago Coal & Dock Co. v. Bassett*, 309 U. S. 251) or that he was injured "in the course of employment" (*Parker v. Motor Boat Sales, Inc.*, 314 U. S. 244) and the Federal Communications Commission's determination that one company is under the "control" of another (*Rochester Telephone Corp. v. United States*, 307 U. S. 125), the Board's determination that specified persons are "employees" under this Act is to be accepted if it has "warrant in the record" and a reasonable basis in law.

In this case the Board found that the designated newsboys work continuously and regularly, rely upon their earnings for the support of themselves and their families, and have their total wages influenced in large measure by the publishers who dictate their buying and selling prices, fix their markets and control their supply of papers. Their hours of work and their efforts on the job are supervised and to some extent prescribed by the publishers or their agents. Much of their sales equipment and advertising materials is furnished by the publishers with the intention that it be used for the publisher's benefit. Stating that "the primary consideration in the determination of the applicability of the statutory definition is whether effectuation of the declared policy and purposes of the Act comprehend securing to the individual the rights guaranteed and protection afforded by the act," the Board concluded that the newsboys are employees. The record sustains the Board's findings and there is ample basis in the law for its conclusion. . . .

The judgments are reversed and the causes are remanded for further proceedings not inconsistent with this opinion.

MR. JUSTICE REED concurs in the result. MR. JUSTICE ROBERTS dissents.<sup>11</sup>

### Licenses

**City of Chicago v. Kirkland, Circuit Court of Appeals, Seventh Circuit, 1935. 79 F. (2d) 963.**

LINDLEY, District Judge. Under the ordinances of the City of Chicago, the mayor is authorized to issue and revoke licenses to theaters. The authority to revoke is conditioned upon the existence of the fact that the licensee has violated or is violating the city ordinances or state statutes. The mayor, having witnessed the production of the play "Tobacco Road," found the same to be indecent and degrading, and the production of same, therefore, to be a violation of the city ordinances, and revoked the license of the theater in which it was produced. The District Court awarded a preliminary injunction restraining the mayor from carrying the revocation into effect, and this appeal followed.

The pertinent sections of the ordinance are included in the footnote.<sup>12</sup>

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<sup>11</sup> Determining whether an individual is an employee or an independent contractor is a most vexing problem under many statutes, e. g.: the National Labor Relations Act, State labor acts, the Fair Labor Standards Act, Social Security law, State unemployment compensation acts, fair employment practices acts, workmen's compensation acts, and others.

It is by no means settled whether this determination is for the agencies or the courts.

Illustration of the difficulties that arise is afforded by a pair of decisions rendered within a period of four months by the Court of Appeals for the Sixth Circuit. In *Walling v. American Needlecrafts, Inc.* (CCA 6th, 1943), 139 F. (2d) 60, it was found that certain homeworkers were "employees" for purposes of the Fair Labor Standards Act. But when the Commissioner of Internal Revenue urged, in reliance on that decision, that such individuals should be treated as employees under the Social Security law, the court (in a case involving substantially the same contractual relationship and some of the same individuals) ruled that the term was used in different senses in the two statutes, and that individuals who were employees under the Fair Labor Standards Act were not employees under the Social Security law. *Glenn v. Beard* (CCA 6th, 1944), 141 F. (2d) 376.

<sup>12</sup> "4222. Indecent acts, suggestive singing, abusive language, obscene gestures. Any person who shall commit any indecent, lewd or filthy act in any place in the city, or shall utter any lewd or filthy words, or shall sing any song the words of which are suggestive of indecency or immorality, or use any threatening or abusive language in the hearing of other persons publicly, or shall make any obscene gesture to or about any other persons publicly, shall be deemed a disorderly person, and shall be fined not less than five dollars nor more than one hundred dollars for each offense.

"4223. Indecent or lewd books, pictures, plays, etc.—Exhibition of picture of nude figure. It shall be unlawful for any person to exhibit, sell or offer to sell, or circulate or distribute, any indecent or lewd book, picture or other things whatever of an immoral or scandalous nature, or to exhibit, in any place where the same can be seen from the public highway, or in a public place

The evidence submitted includes the script of the play as produced, and certain affidavits of various parties, most of whom had seen the production upon the stage. These witnesses are far from accord. Eminent citizens bear witness to totally different impressions from their personal observation of the play. On the one hand, an ex-governor, a circuit judge, judges of the municipal court, members of the bar, and other credible witnesses testify that certain scenes in the play portray vividly, with wealth of revolting detail, sexual excitement, sensuous emotion, and lustful passion; present obvious suggestions of seduction, adultery, and incest, and repeated profanity and blasphemy. They say that gestures and actions of the actors, not shown by the script, tend strongly to degrade and to debase the mind and moral standards of the observers.

For the appellees, eminent clerics, a professor of literature, members of civic dramatic organizations, well-known writers, and other witnesses, prominent in the city, tell us that the production of the play is of Zola-like, realistic character, representative and reproductive of a phase of life in the southern part of the United States so sordid and revolting as to inspire in hearers the zeal of crusaders to bring about the removal of such festers from our national social structure. These witnesses see in the play another "Uncle Tom's Cabin," the widespread production of which will create and disseminate a country-wide demand for a healthful change in the education and environment of the human beings living under the sordid conditions pictured.

We have read the script and the affidavits of those who have seen and heard the production. The members of this court, and apparently the district judge, have not seen the play produced. The motives of the respective witnesses are not to be impeached. They are men and women of such character, so lacking in personal interest, that their good faith, high intent, and honesty of purpose must stand unchallenged and above question. The conflict among them arises out of the variant mental and intellectual attitudes from which the play has been viewed. One sees obscenity unexcused by any motive and unredeemed by good intent. The other sees revolting realism wholly excused, however, by the further and nobler intent of inspiring desire to remedy evil conditions.

In cases such as this, at least, the judiciary is not a superior arbiter of right or wrong, or the custodian of the moral or ethical standards of citizens. Rather, the court is part of one of the co-ordinate branches of government charged with one duty and burdened with one responsibility—that of determining whether under the facts, once determined, an act done or threatened, either by private citizens or public official

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frequented by children which is not connected with any art or educational exhibition, any picture representing a person in a nude state, or to exhibit or perform any indecent, immoral or lewd play or other representation, under a penalty of not less than twenty dollars nor more than one hundred dollars for each offense."

is legal, in accordance with the law. And just as courts are loath, except in the clearest of cases, to declare an act of the Legislature invalid, so, too, they are loath, except in the clearest of cases, to declare invalid the acts of that other co-ordinate branch of the government, the executive or administrative department. Indeed, they have no power at will to invalidate official administrative acts. They may inquire and determine only whether such acts are legal. Such inquiry necessitates, incidentally to its correct reply, the correlated inquiry of whether the administrative or legislative act is arbitrary, without basis for legal action—whether, in short, it is reasonably within the legal power of that governmental department whose act is complained of.

While some courts, in cases where revocation of a right or license is conditioned upon the fact that the statutes or ordinances have been violated, have held that a prior conviction is an essential condition precedent to administrative action, the contrary is quite generally the rule, and the administrative officer or other fact-finding body may pass upon the question of violation, preliminary to executive or legislative action. *Pearson v. Zehr*, 138 Ill. 48, 29 N. E. 854, 32 Am. St. Rep. 113; *Sings v. City of Joliet*, 237 Ill. 300, 86 N. E. 663, 22 L. R. A. (N. S.) 1128, 127 Am. St. Rep. 323; *Wiggins v. City of Chicago*, 68 Ill. 372; *Malkan v. City of Chicago*, 217 Ill. 471, 75 N. E. 548, 2 L. R. A. (N. S.) 488, 3 Ann. Cas. 1104; *American School of Magnetic Healing v. McAnnulty*, 187 U. S. 94, 23 S. Ct. 33, 47 L. Ed. 90. Under this rule, however, to furnish due process of law, it is equally logical and judicially well settled that such administrative action should be subject to judicial review. *Ohio Valley Water Co. v. Ben Avon Borough*, 253 U. S. 287, 40 S. Ct. 527, 64 L. Ed. 908; *Southern Ry. Co. v. Com. of Virginia*, 290 U. S. 190, 54 S. Ct. 148, 78 L. Ed. 260.

The extent of such review is not so generally agreed upon, but in the United States courts, it is the established rule that whether established facts, found by the administrative body, amount to a violation, becomes a question of law for the court.

Thus where an injunction was granted against an order of the Postmaster General barring certain literature from the mails because in violation of federal statutes, the Supreme Court, in *American School of Magnetic Healing v. McAnnulty*, 187 U. S. 94, 23 S. Ct. 33, 39, 47 L. Ed. 90, said: "Conceding, arguendo, that when a question of fact arises, which, if found in one way, would show a violation of the statutes in question in some particular, the decision of the Postmaster General that such violation had occurred, based upon some evidence to that effect, would be conclusive and final, and not the subject of review by any court, yet to that assumption must be added the statement that, if the evidence before the Postmaster General, in any view of the facts, failed to show a violation of any Federal law, the determination of that official that such violation existed would not be the determination of

a question of fact, but a pure mistake of law on his part, because the facts, being conceded, whether they amounted to a violation of the statutes would be a legal question, and not a question of fact." To the same effect is *Swearingen v. United States*, 161 U. S. 446, 16 S. Ct. 562, 40 L. Ed. 765.

Otherwise stated, this legal question is whether there was sufficient evidence before the administrative officer to justify a finding of violation. In other words, the judiciary is not permitted to substitute its judgment upon disputed facts for that of the administrative officer. It may inquire only whether those facts include substantial evidence sufficient to justify a finding of violation. Stated otherwise again, the limited question submitted to the court is whether the administrative officer has acted arbitrarily and, therefore, illegally. Thus in *Ambruster v. Mellon*, 59 App. D. C. 341, 41 F. (2d) 430, 432, the Court of Appeals for the District of Columbia said: "The statute accordingly invested the appellees with authority to determine whether imported drugs were adulterated or misbranded in the sense of the act, when offered for entry into this country. Such authority is not simply ministerial in character, but calls for a finding of facts and the exercise of judgment upon the facts when found. Accordingly the exercise of this authority by the appellees will not be reviewed by the courts unless it has been capriciously or arbitrarily exercised." . . .

Again in *State of Louisiana v. McAdoo*, 234 U. S. 627, 34 S. Ct. 938, 941, 58 L. Ed. 1506, the court said: "There is a class of cases which hold that if a public officer be required by law to do a particular thing, not involving the exercise of either judgment or discretion, he may be required to do that thing upon application of one having a distinct legal interest in the doing of the act. Such an act would be ministerial only. But if the matter in respect to which the action of the official is sought is one in which the exercise of either judgment or discretion is required, the courts will refuse to substitute their judgment or discretion for that of the official intrusted by law with its execution. Interference in such a case would be to interfere with the ordinary function of government."

Thus it is clear that the only question legitimately before us is whether, in the present instance, the mayor acted upon evidence which would justify a finding of violation of the ordinances of Chicago by appellees. It is not a question of whether he decided rightly or wrongly. We are powerless to review his action as by writ of error, or to substitute our judgment for his. We may inquire only as to whether he acted arbitrarily.

To this question there can be but one answer. The mayor saw the play. He saw the gestures and actions of actors and actresses complained of. He had before him this evidence; and in the absence of personal observation on our part, and examining only the evidence in the record,

we must find that there is substantial credible evidence to support his finding. It cannot be said that he acted without justification or arbitrarily; therefore, the District Court could not rightfully set aside and supersede his administrative action.

In view of our conclusions, though feeling that the jurisdictional questions presented by appellants are without merit, it is unnecessary to discuss them.

The decree is reversed, with direction to dissolve the preliminary injunction.<sup>13</sup>

### Rule Making

**Pacific States Box & Basket Co. v. White, Supreme Court of the United States, 1935. 296 U. S. 176, 80 L. Ed. 138, 56 S. Ct. 159.**

[The Oregon statutes authorized the Chief of the Division of Plant Industry of the Department of Agriculture to fix and promulgate "official standards for containers of horticultural products . . . in order to promote, protect, further and develop the horticultural interests" of the state. Pursuant to this statute the Chief of the Division promulgated a rule prescribing the size and specifications of the container to be used thereafter in marketing raspberries and strawberries. The plaintiff manufactured a different type of container than that specified and had sold a considerable portion of his product in Oregon. The effect of the new rule was to prevent further sales by him. Suit was brought in the Federal courts seeking an injunction against the enforcement of the rule on the ground, among others, of deprivation of rights guaranteed under the due process clause of the Federal Constitution. The defendant filed a motion to dismiss.]

MR. JUSTICE BRANDEIS delivered the opinion of the court. . . .

Plaintiff contends that since the case was heard on motion to dismiss the bill, all allegations therein made must be accepted as true; and, among others, the charge that "there is no necessity for the particular orders relating to strawberries or raspberries" "based on considerations of public health, or to prevent fraud or deception, or any other legitimate use of the police power, and the particular container described . . . does not of necessity promote, protect, further or develop the horticultural interests of the State"; and that its necessary effect is "to grant a monopoly to manufacturers of the so-called hallocks." The order here in question deals with a subject clearly within the scope of the police power. See *Turner v. Maryland*, 107 U. S. 38. When such legislative action "is called in question, if any state of facts reasonably can be conceived that would sustain it, there is a presumption of the existence

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<sup>13</sup> When the discretionary element looms large, the possibility of judicial review is correspondingly reduced. Where does administrative discretion end and judicial power begin? What are the controlling factors? Levitt, "The Judicial Review of Executive Acts," 23 Mich. L. Rev. 588 (1925).

of that state of facts, and one who assails the classification must carry the burden of showing by a resort to common knowledge or other matters which may be judicially noticed, or to other legitimate proof, that the action is arbitrary." *Borden's Farm Products Co. v. Baldwin*, 293 U. S. 194, 209. The burden is not sustained by making allegations which are merely the general conclusion of law or fact. See *Public Service Com. v. Great Northern Utilities Co.*, 289 U. S. 130, 136, 137. Facts relied upon to rebut the presumption of constitutionality must be specifically set forth. See *Aetna Ins. Co. v. Hyde*, 275 U. S. 440; *O'Gorman & Young v. Hartford Fire Ins. Co.*, 282 U. S. 251; *Hegeman Farms Corp. v. Baldwin*, 293 U. S. 163. A motion to dismiss, like a demurrer, admits only facts well pleaded. Compare *St. Louis, Kennett & Southeastern R. Co. v. United States*, 267 U. S. 346, 349.

It is urged that this rebuttable presumption of the existence of a state of facts sufficient to justify the exertion of the police power attaches only to acts of legislature; and that where the regulation is the act of an administrative body, no such presumption exists, so that the burden of proving the justifying facts is upon him who seeks to sustain the validity of the regulation. The contention is without support in authority or reason, and rests upon misconception. Every exertion of the police power, either by the legislature or by an administrative body, is an exercise of delegated power. Where it is by a statute, the legislature has acted under power delegated to it through the Constitution. Where the regulation is by an order of an administrative body, that body acts under a delegation from the legislature. The question of law may, of course, always be raised whether the legislature had power to delegate the authority exercised. Compare *Panama Refining Co. v. Ryan*, 293 U. S. 388 and *A. L. A. Schechter Poultry Corp. v. United States*, 295 U. S. 495. But where the regulation is within the scope of authority legally delegated, the presumption of the existence of facts justifying its specific exercise attaches alike to statutes, to municipal ordinances, and to orders of administrative bodies. Compare *Aetna Ins. Co. v. Hyde*, 275 U. S. 440, 447. Here there is added reason for applying the presumption of validity; for the regulation now challenged was adopted after notice and public hearing as the statute required. It is contended that the order is void because the administrative body made no special findings of fact. But the statute did not require special findings; doubtless because the regulation authorized was general legislation, not an administrative order in the nature of a judgment directed against an individual concern. Compare *Wichita Railroad & Light Co. v. Public Utilities Com.*, 260 U. S. 48, 58, 59; *Mahler v. Eby*, 264 U. S. 32, 44; *Southern Ry. Co. v. Virginia*, 290 U. S. 190, 193, 194. . . .

Affirmed.<sup>14</sup>

<sup>14</sup> Both in drafting statutes providing for judicial review of administrative determinations, and in judicial proceedings arising under such statutes, the

**National Broadcasting Co., Inc. v. United States, Supreme Court of the United States, 1943. 319 U. S. 190, 87 L. Ed. 1344, 63 S. Ct. 997.**

MR. JUSTICE FRANKFURTER delivered the opinion of the court.

These suits were brought on October 30, 1941, to enjoin the enforcement of the Chain Broadcasting Regulations promulgated by the Federal Communications Commission on May 2, 1941, and amended on October 11, 1941. . . .

On March 18, 1938, the Commission undertook a comprehensive investigation to determine whether special regulations applicable to radio stations engaged in chain broadcasting were required in the "public interest, convenience, or necessity." The Commission's order directed that inquiry be made, *inter alia*, in the following specific matters: The number of stations licensed to or affiliated with networks, and the amount of station time used or controlled by networks; the contractual rights and obligations of stations under their agreements with networks; the scope of network agreements containing exclusive affiliation provisions and restricting the network from affiliating with other stations in the same area; the rights and obligations of stations with respect to network advertisers; the nature of the program service rendered by stations licensed to networks; the policies of networks with respect to character of programs, diversification, and accommodation to the particular requirements of the areas served by the affiliated stations; the extent to which affiliated stations exercise control over

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distinction is often overlooked between the review of the *quasi-judicial*, the *quasi-legislative*, and the merely administrative performances of the commission. Orders in all of these three categories are frequently reviewed by state courts as though they were identical in nature.

This is particularly true in the licensing field. The process of granting licenses has a variety of aspects depending upon the particular type of license, the character of the business, the public interest, the historical tradition behind it, etc. The granting of certain licenses is normally treated as merely administrative or ministerial in nature (e. g., saloon licenses, peddlers' licenses, etc.). On the other hand granting licenses or "certificates of convenience and necessity" to public utilities, motor carriers and other more highly regarded occupations, rises to a higher dignity, and may well be regarded as *quasi-legislative*, or even, under proper statutes, *quasi-judicial*. Confusion as to the character of the function performed all too often leads to improper disposition of the question as to judicial review of the facts.

However difficult it may be to distinguish particular cases, gain is made if one recognizes that the judiciary should normally have no concern with fact determinations of administrative authorities if (1) the fact determination really involves policy considerations of a legislative nature, or (2) the fact determinations should be regarded as simply incidental to administrative enforcement or ministerial routine. For a glaring example of failure to observe these distinctions, see *Pennsylvania R. Co. v. Public Utilities Commission*, 123 Ohio St. 655, 176 N. E. 573 (1931).



programs, advertising contracts, and related matters; the nature and extent of network program duplication by stations serving the same area; the extent to which particular networks have exclusive coverage in some areas; the competitive practices of stations engaged in chain broadcasting; the effect of chain broadcasting upon stations not licensed to or affiliated with networks; practices or agreements in restraint of trade, or in furtherance of monopoly, in connection with chain broadcasting; and the scope of concentration of control over stations, locally, regionally, or nationally, through contracts, common ownership, or other means. [The court then reviewed in detail the course of proceedings culminating in the adoption of the Regulations.]

. . . We turn now to the Regulations themselves, illumined by the practices in the radio industry disclosed by the Commission's investigation. The Regulations, which the Commission characterized in its Report as "the expression of the general policy we will follow in exercising our licensing power," are addressed in terms to station licensees and applicants for station licenses. They provide, in general, that no licenses shall be granted to stations or applicants having specified relationships with networks. Each Regulation is directed at a particular practice found by the Commission to be detrimental to the "public interest," and we shall consider them *seriatim*. In doing so, however, we do not overlook the admonition of the Commission that the Regulations as well as the network practices at which they are aimed are interrelated: "In considering above the network practices which necessitate the regulations we are adopting, we have taken each practice singly, and have shown that even in isolation each warrants the regulation addressed to it. But the various practices we have considered do not operate in isolation; they form a compact bundle or pattern, and the effect of their joint impact upon licensees necessitates the regulations even more urgently than the effect of each taken singly."

. . . .  
The appellants attack the validity of these Regulations along many fronts. They contend that the Commission went beyond the regulatory powers conferred upon it by the Communications Act of 1934; that even if the Commission were authorized by the Act to deal with the matters comprehended by the Regulations, its action is nevertheless invalid because the Commission misconceived the scope of the Act, particularly § 313 which deals with the application of the anti-trust laws to the radio industry; that the Regulations are arbitrary and capricious; that if the Communications Act of 1934 were construed to authorize the promulgation of the Regulations, it would be an unconstitutional delegation of legislative power; and that, in any event, the Regulations abridge the appellants' right of free speech in violation of the First Amendment. We are thus called upon to determine whether Congress

has authorized the Commission to exercise the power asserted by the Chain Broadcasting Regulations, and if it has, whether the Constitution forbids the exercise of such authority.

Section 1 of the Communications Act states its "purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges." Section 301 particularizes this general purpose with respect to radio: "It is the purpose of this Act, among other things, to maintain the control of the United States over all the channels of interstate and foreign radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license." To that end a Commission composed of seven members was created, with broad licensing and regulatory powers.

Section 303 provides:

"Except as otherwise provided in this Act, the Commission from time to time, as public convenience, interest, or necessity requires, shall—

- (a) Classify radio stations;
- (b) Prescribe the nature of the service to be rendered by each class of licensed stations and each station within any class;

(f) Make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this Act . . . ;

(g) Study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest;

(i) Have authority to make special regulations applicable to radio stations engaged in chain broadcasting;

(r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act. . . ."

The criterion governing the exercise of the Commission's licensing power is the "public interest, convenience, or necessity." §§ 307 (a) (d), 309 (a), 310, 312. In addition, § 307 (b) directs the Commission that "In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and com-

munities as to provide a fair, efficient, and equitable distribution of radio service to each of the same."

The Act itself establishes that the Commission's powers are not limited to the engineering and technical aspects of regulation of radio communication. Yet we are asked to regard the Commission as a kind of traffic officer, policing the wave lengths to prevent stations from interfering with each other. But the Act does not restrict the Commission merely to supervision of the traffic. It puts upon the Commission the burden of determining the composition of that traffic. The facilities of radio are not large enough to accommodate all who wish to use them. Methods must be devised for choosing from among the many who apply. And since Congress itself could not do this, it committed the task to the Commission.

The Commission was, however, not left at large in performing this duty. The touchstone provided by Congress was the "public interest, convenience, or necessity," a criterion which "is as concrete as the complicated factors for judgment in such a field of delegated authority permit." *Federal Communications Commission v. Pottsville Broadcasting Co.*, 309 U. S. 134, 138. "This criterion is not to be interpreted as setting up a standard so indefinite as to confer an unlimited power. Compare *New York Central Securities Co. v. United States*, 287 U. S. 12, 24. The requirement is to be interpreted by its context, by the nature of radio transmission and reception, by the scope, character and quality of services." *Federal Radio Commission v. Nelson Bros. Co.*, 289 U. S. 266, 285.

The "public interest" to be served under the Communications Act is thus the interest of the listening public in "the larger and more effective use of radio." § 303 (g). The facilities of radio are limited and therefore precious; they cannot be left to wasteful use without detriment to the public interest. "An important element of public interest and convenience affecting the issue of a license is the ability of the licensee to render the best practicable service to the community reached by his broadcasts." *Federal Communications Commission v. Sanders Radio Station*, 309 U. S. 470, 475. The Commission's licensing function cannot be discharged, therefore, merely by finding that there are no technological objections to the granting of a license. If the criterion of "public interest" were limited to such matters, how could the Commission choose between two applicants for the same facilities, each of whom is financially and technically qualified to operate a station? Since the very inception of federal regulation by radio, comparative considerations as to the services to be rendered have governed the application of the standard of "public interest, convenience, or necessity." See *Federal Communications Commission v. Pottsville Broadcasting Co.*, 309 U. S. 134, 138 n. 2.

The avowed aim of the Communications Act of 1934 was to secure the maximum benefits of radio to all the people of the United States. To that end Congress endowed the Communications Commission with comprehensive powers to promote and realize the vast potentialities of radio. Section 303 (g) provides that the Commission shall "generally encourage the larger and more effective use of radio in the public interest"; subsection (i) gives the Commission specific "authority to make special regulations applicable to radio stations engaged in chain broadcasting"; and subsection (r) empowers it to adopt "such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act."

These provisions, individually and in the aggregate, preclude the notion that the Commission is empowered to deal only with technical and engineering impediments to the "larger and more effective use of radio in the public interest." We cannot find in the Act any such restriction of the Commission's authority. Suppose, for example, that a community can, because of physical limitations, be assigned only two stations. That community might be deprived of effective service in any one of several ways. More powerful stations in nearby cities might blanket out the signals of the local stations so that they could not be heard at all. The stations might interfere with each other so that neither could be clearly heard. One station might dominate the other with the power of its signal. But the community could be deprived of good radio service in ways less crude. One man, financially and technically qualified, might apply for and obtain the licenses of both stations and present a single service over the two stations, thus wasting a frequency otherwise available to the area. The language of the Act does not withdraw such a situation from the licensing and regulatory powers of the Commission, and there is no evidence that Congress did not mean its broad language to carry the authority it expresses.

In essence, the Chain Broadcasting Regulations represent a particularization of the Commission's conception of the "public interest" sought to be safeguarded by Congress in enacting the Communications Act of 1934. The basic consideration of policy underlying the Regulations is succinctly stated in its Report: "With the number of radio channels limited by natural factors, the public interest demands that those who are entrusted with the available channels shall make the fullest and most effective use of them. If a licensee enters into a contract with a network organization which limits his ability to make the best use of the radio facility assigned him, he is not serving the public interest. . . . The net effect [of the practices disclosed by the investigation] has been that broadcasting service has been maintained at a level below that possible under a system of free competition. Having so found, we would be remiss in our statutory duty of encouraging 'the larger and

more effective use of radio in the public interest' if we were to grant licenses to persons who persist in these practices." (Report, pp. 81, 82.)

We would be asserting our personal views regarding the effective utilization of radio were we to deny that the Commission was entitled to find that the large public aims of the Communications Act of 1934 comprehend the considerations which moved the Commission in promulgating the Chain Broadcasting Regulations. True enough, the Act does not explicitly say that the Commission shall have power to deal with network practices found inimical to the public interest. But Congress was acting in a field of regulation which was both new and dynamic. "Congress moved under the spur of a widespread fear that in the absence of governmental control the public interest might be subordinated to monopolistic domination in the broadcasting field." *Federal Communications Commission v. Pottsville Broadcasting Co.*, 309 U. S. 134, 137. In the context of the developing problems to which it was directed, the Act gave the Commission not niggardly but expansive powers. It was given a comprehensive mandate to "encourage the larger and more effective use of radio in the public interest," if need be, by making "special regulations applicable to radio stations engaged in chain broadcasting." § 303 (g) (i).

Generalities unrelated to the living problems of radio communication of course cannot justify exercises of power by the Commission. Equally so, generalities empty of all concrete considerations of the actual bearing of regulations promulgated by the Commission to the subject-matter entrusted to it, cannot strike down exercises of power by the Commission. While Congress did not give the Commission unfettered discretion to regulate all phases of the radio industry, it did not frustrate the purposes for which the Communications Act of 1934 was brought into being by attempting an itemized catalogue of the specific manifestations of the general problems for the solution of which it was establishing a regulatory agency. That would have stereotyped the powers of the Commission to specific details in regulating a field of enterprise the dominant characteristic of which was the rapid pace of its unfolding. And so Congress did what experience had taught it in similar attempts at regulation, even in fields where the subject-matter of regulation was far less fluid and dynamic than radio. The essence of that experience was to define broad areas for regulation and to establish standards for judgment adequately related in their application to the problems to be solved.

We conclude, therefore, that the Communications Act of 1934 authorized the Commission to promulgate regulations designed to correct the abuses disclosed by its investigation of chain broadcasting. There remains for consideration the claim that the Commission's exercise of such authority was unlawful.

The Regulations are assailed as "arbitrary and capricious." If this contention means that the Regulations are unwise, that they are not likely to succeed in accomplishing what the Commission intended, we can say only that the appellants have selected the wrong forum for such a plea. What was said in *Board of Trade v. United States*, 314 U. S. 534, 548, is relevant here: "We certainly have neither technical competence nor legal authority to pronounce upon the wisdom of the course taken by the Commission." Our duty is at an end when we find that the action of the Commission was based upon findings supported by evidence, and was made pursuant to authority granted by Congress. It is not for us to say that the "public interest" will be furthered or retarded by the Chain Broadcasting Regulations. The responsibility belongs to the Congress for the grant of valid legislative authority and to the Commission for its exercise.

It would be sheer dogmatism to say that the Commission made out no case for its allowable discretion in formulating these Regulations. Its long investigation disclosed the existences of practices which it regarded as contrary to the "public interest." The Commission knew that the wisdom of any action it took would have to be tested by experience: "We are under no illusion that the regulations we are adopting will solve all questions of public interest with respect to the network system of program distribution. . . . The problems in the network field are interdependent, and the steps now taken may perhaps operate as a partial solution of problems not directly dealt with at this time. Such problems may be examined again at some future time after the regulations here adopted have been given a fair trial." (Report, p. 88.) The problems with which the Commission attempted to deal could not be solved at once and for all time by rigid rules-of-thumb. The Commission therefore did not bind itself inflexibly to the licensing policies expressed in the Regulations. In each case that comes before it the Commission must still exercise an ultimate judgment whether the grant of a license would serve the "public interest, convenience, or necessity." If time and changing circumstances reveal that the "public interest" is not served by application of the Regulations, it must be assumed that the Commission will act in accordance with its statutory obligations.

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### Removal of Officers

**State ex rel. Attorney General v. Hawkins, Supreme Court of Ohio, 1886. 44 Ohio St. 98, 5 N. E. 228.**

[Information in *quo warranto* seeking to oust from office the defendants who had been removed from the office by order of the governor.]

MINSHALL, J. . . . The next question is as to whether the exercise of the power can be reviewed in this court. As the governor had the

power to remove, and as in exercising it he did not act in a judicial capacity within the meaning of the constitution, it would seem to follow as a corollary, that the exercise of the power by him, can not be inquired into in this court, and held for naught in a proceeding in *quo warranto*, simply because he may have erred in exercising the power reposed in him by the statute. The only question that this court can consider, is, whether charges involving official misconduct were preferred, of which the parties had notice, and that he acted upon these charges, and removed the respondents, for the reasons stated in the charges. The law as to this question is, as we think, accurately stated by DIXON, C. J., in *State v. McGarry*, supra: "The cause must be one which touches the qualifications of the officer for the office, and shows that he is not a fit or proper person to perform the duties; and when such a case is assigned, the power to determine whether it exists or not is vested exclusively in the board, and its decision upon the facts can not be reviewed in the courts. The only question of judicial cognizance is as to whether the board has kept within its jurisdiction, or whether the cause assigned is a cause for removal under the statute." See also the following cases cited, supra, *State v. Prince*, *Keenan v. Perry*, *Ex parte Wiley*, *Thompson v. Holt*, *State v. Frazier*, *State v. Doherty*, *Donahue v. County of Will*, and, also, the case of *State v. Chase*, 5 Ohio St. 528.

The cases taking a different view are, as a rule, those holding that the power to remove is a judicial one, and can only be exercised by the courts. Thus, in *Dullam v. Willson*, supra, it is said to be "undoubtedly true that no court can review the lawful discretion of any body that is not a court, and that the executive stands in this respect on the same footing with all other persons and bodies." The decision of the court was placed on the ground that the power of the governor had exercised—the removal of a trustee of a deaf and dumb asylum—was judicial in character, and could not lawfully be conferred on him.

It may be admitted that such power is liable to abuse. "Yet," as said by WALKER, J., in *Donahue v. County of Will*, "this is not a legitimate argument against delegating power to tribunals to be exercised for governmental purposes." For an abuse of such power, the remedy is, either to the people in the election of a successor to the officer abusing the power reposed, or, when the removal is characterized by circumstances of flagrant abuse, he may be impeached and deprived of his office.

The charges that were presented to the governor, and upon which he acted in removing the defendants, were such as to leave no question but that they amounted to official misconduct, and for which they should have been removed, if found true. It was charged that they had appointed a large number of persons to places on the police force wholly unfit to act as police officers, some of whom are gamblers, some have served terms in the workhouse, in the penitentiary, in the jail,

have been inmates of the house of refuge, some have been keepers of houses of prostitution, and a number have been discharged by said board for drunkenness and other offenses repeatedly committed, and have been reinstated notwithstanding said offenses. It is true these charges are denied in manner and form, but whether true or not was for the governor to determine. This court can only pass upon the sufficiency of the charges as a matter of law—not upon their truth. . . .

The demurrers to the answers are sustained; and the cause having been submitted to the court upon the pleadings and demurrers, judgment of ouster is rendered against the defendants.

Judgment of ouster.<sup>15</sup>

### Taxation

**Merrill v. Humphrey, Supreme Court of Michigan, 1871. 24 Mich. 170.**

COOLEY, J. A short statement of this case is, that it is a bill filed to restrain the auditor-general and the county treasurer of Osceola county from proceeding to sell the lands of complainant, situated in said county, for the taxes assessed thereon for the year 1869. The complainant alleges that the supervisors of the several townships in which his lands are situated, fraudulently assessed them above their value, and relatively very much beyond the assessment of other property, for the purpose of relieving resident taxpayers from their proportion of the taxes. He avers that he has ever been ready and willing, and by his bill offers, to pay his just proportion of said taxes whenever the same shall be properly and legally assessed, but he submits that the tax so assessed is unjust, inequitable, and illegal, and he prays a perpetual injunction against proceedings for their collection. The attorney-general demurred to the bill, and the court below overruled the demurrer, and made a decree that the tax complained of be set aside, canceled and declared void, and that the lands be declared free from the lien thereof.

It is impossible to sustain this decree. Accepting to the fullest extent, as we must upon demurrer, the truth of the matters alleged in the bill, there is no equity in relieving the complainant altogether from the payment of taxes upon his lands. He owes to the state, county and township the same duty, and is under the same obligation with every other property-owner therein; and the attempt by an official to exact from him more than is just, will not excuse him from bearing the burden so far as it is just. The state must give him a remedy against

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<sup>15</sup> A palpable abuse of discretion in this field is sometimes, though reluctantly, corrected by the courts. *People ex rel. Hogan v. French*, 119 N. Y. 493, 23 N. E. 1058 (1890). See, "Conclusiveness of Governor's Decision in Removing Officers," 52 A. L. R. 7 (1928).



oppression, but it is not bound to reward him because a wrong has been meditated which had him for its object. The state cannot warrant the integrity of every inferior municipal officer, in whose selection the citizens generally have had no choice; and if it could, its responsibility ought not to exceed that which an individual would be under in the like circumstances, which could only be to make good to the party what he may have suffered by the wrong; which, in this case, at the time the decree was rendered, was nothing. Certainly, the offer of the complainant to pay what is just, cannot excuse him altogether from making any payment. The most that he can claim under any circumstances, is that the state shall prevent the meditated injury, and relieve his land when its proper burden shall have been discharged. It follows that the decree appealed from must be reversed.

It remains to be seen whether the case made by the bill would have entitled the complainant to any relief whatever; for if it would, it may be proper to shape our decree differently from what we otherwise should. The attorney-general insists that an assessment for the purposes of taxation is a proceeding *quasi-judicial* in its nature; the valuation being confided to the judgment and discretion of the assessor; and that, as the statute has provided for no review of his decision by the courts, it is not competent to appeal to them for redress, upon allegations impugning the fairness of his conclusions. And he very properly and strongly sets forth the evils that may arise if the process of injunction shall be employed to stay the collection of the public revenue whenever the judgment of the taxpayer regarding relative values may so far differ from that of the assessor that he is led to suspect favoritism and partiality.

That this process may be employed to an extent that shall prove embarrassing to the public authorities is quite possible; and that fact should make us hesitate long and consider the subject fully in all its bearings, before sustaining a jurisdiction that shall appear in the least doubtful or unnecessary to the due protection of individual rights.

And we agree fully with the attorney-general, that the courts cannot sit in judgment upon supposed errors of the assessor, and substitute their own opinions for the conclusions he has drawn, where it is his judgment, and not theirs, to which the subject has been confided by the law.

But it remains to be seen whether what is sought here is a review of the assessor's judgment. The charge is, that the several supervisors have purposely assessed the property of the complainant beyond its value, and above the assessment of other persons, with a fraudulent intent to compel the payment by him of an undue proportion of the public taxes. The demurrer confesses the charge, so that we are not troubled with any collateral questions or inquiries into matters of fact. It is admitted that the supervisors have not brought their judgment to bear upon the question of value, but have set aside and disregarded

their duty for the express purpose of perpetrating a wrong upon an individual. The question, then, is this: A public officer being empowered by law to apportion certain burdens among the citizens as in his judgment shall be just, being actuated by a fraudulent purpose, instead of obeying the law disregards its mandate, declines to bring his judgment to bear upon the question submitted to him, and arbitrarily and with express reference to defeating the ends at which the law aims, determines to impose an excessive burden upon a particular citizen: Has this citizen any remedy against the threatened wrong?

We think this question can admit of but one answer. A discretionary power cannot excuse an officer for refusal to exercise his discretion. His judgment is appealed to—not his resentments, his cupidity or his malice. He is the instrument of the law to accomplish a particular end through specified means, and when he purposely steps aside from his duty to inflict a wanton injury, the confidence reposed in him has not disarmed the law of the means of prevention. His judgment may indeed be final if he shall exercise it, but an arbitrary and capricious exertion of official authority, being without law, and done to defeat the purpose of the law, must, like all other wrongs, be subject to the law's correction.

There is no function of government which requires more care, prudence and caution for its legal exercise than that of taxation. The very nature of the power to tax is so general, so sweeping, so pervading, and oftentimes its exercise is so onerous, that special cautions are prescribed to prevent abuse, extortion, and oppression. In many cases these fail of their object; and nothing is better understood than that it is impossible that tax laws shall in all instances operate equally and justly. But any intentional favoritism even though from motives of public interest, if without express authority of law, will render void the tax proceedings. This has been held where the property was exempted by the taxing officers in order to encourage the erection of a public hotel; the burden taken from this being imposed upon the public at large. *Weeks v. Milwaukee*, 10 Wis. 242, approved in *Hersey v. Supervisors*, etc., 16 Wis. 185. So the imposition of the burden in disregard of any rule of uniformity, is always held unwarranted. *Knowlton v. Supervisors*, 9 Wis. 410; *Motz v. Detroit*, 18 Mich. 495; *Bay City v. State Treasurer*, 23 Mich. 499. And some cases have gone so far as to hold that where the legislature, unjustly, and with the improper motive of increasing the revenues of a city, have brought within its limits, and subjected to its taxation, property purely agricultural in its nature, and so situated as not to receive the benefits of city government, conveniences and regulations, the courts might interfere and restrain city taxation upon such property. *Covington v. Southgate*, 15 B. Monr. 491; *Arbegust v. Louisville*, 2 Bush. 271; *Morford v. Unger*, 8 Iowa 82; *Langworthy v. Dubuque*, 13 Iowa 86; *Fulton v. Davenport*,

17 Iowa 404; *Bradshaw v. Omaha*, 1 Neb. 16. It may be questionable, perhaps, whether these last cases have not gone too far; but the ruling that fraudulent taxation should be restrained, wherever the case is such that the motive can be legally inquired into—as it always may be in the case of the subordinate agencies—is in our opinion very clearly sound and wholesome.

What the details of the relief shall be, is not so clear. We have already said that the complainant should be required to do equity as a condition of relief. What is just to the public cannot be done unless he pays within due time such proportion of the tax assessed upon him as he concedes to be fair; and we think this payment should be required by the injunction master to be made to the proper officer as a condition to the allowance of injunction. To this extent, the case is within the principle of *Conway v. Waverly*, 15 Mich. 257, and *Palmer v. Napoleon*, 16 Mich. 176, heretofore decided by us, and of several Wisconsin cases, of which *Hersey v. Supervisors*, etc., supra, is one. Such payment will prevent the proceeding being unnecessarily embarrassing to the public authorities, and if it should be thought that the complainant would be likely to err in his own favor in the estimate he would make, the power the court would have to impose costs upon him, or to deny him costs in case his offer should prove unreasonably small, would perhaps be a sufficient protection against such estimates. We also think that in any such case, if personal taxes are involved, the amount disputed should either be required to be paid into court, or security should be exacted for its payment, if so decreed by the court; and the injunction master would have a discretion to require such security in other cases, which it might sometimes be proper that he should exercise. We think such precautions are only reasonable where interference with the collection of the public revenues is solicited; especially where the grounds of relief must depend upon questions of fact, which questions must be determined upon evidence which, from the very nature of the case, must be wanting in great measure in the elements of certainty.

As we find, therefore, that the case is one in which, upon a proper bill, relief may be had by the complainant in equity, we shall in reversing the decree, order the bill to be dismissed without prejudice. The defendant will recover his costs of both courts.

The other justices concurred.<sup>16</sup>

**Dobson v. Commissioner of Internal Revenue**, Supreme Court of the United States, 1943. 320 U. S. 489, 88 L. Ed. 248, 64 S. Ct. 239.

MR. JUSTICE JACKSON delivered the opinion of the court.

These four cases were consolidated in the Court of Appeals. The facts of one will define the issue present in all.

<sup>16</sup> See Stason, "Judicial Review of Tax Errors," 28 Mich. L. Rev. 637 (1930).

The taxpayer, Collins, in 1929 purchased 300 shares of stock of the National City Bank of New York which carried certain beneficial interests in stock of the National City Company. The latter company was the seller and the transaction occurred in Minnesota. In 1930 Collins sold 100 shares, sustaining a deductible loss of \$41,600.80, which was claimed on his return for that year and allowed. In 1931 he sold another 100 shares, sustaining a deductible loss of \$28,163.78, which was claimed in his return and allowed. The remaining 100 shares he retained. He regarded the purchases and sales as closed and completed transactions.

In 1936 Collins learned that the stock had not been registered in compliance with the Minnesota Blue Sky Laws and learned of facts indicating that he had been induced to purchase by fraudulent representations. He filed suit against the seller alleging fraud and failure to register. He asked rescission of the entire transaction and offered to return the proceeds of the stock, or an equivalent number of shares plus such interest and dividends as he had received. In 1939 the suit was settled, on a basis which gave him a net recovery of \$45,150.63, of which \$23,296.45 was allocable to the stock sold in 1930 and \$6,454.18 allocable to that sold in 1931. In his return for 1939 he did not report as income any part of the recovery. Throughout that year adjustment of his 1930 and 1931 tax liability was barred by the statute of limitations.

The Commissioner adjusted Collins' 1939 gross income by adding as ordinary gain the recovery attributable to the shares sold, but not that portion of it attributable to the shares unsold. The recovery upon the shares sold was not, however, sufficient to make good the taxpayer's original investment in them. And if the amounts recovered had been added to the proceeds received in 1930 and 1931 they would not have altered Collins' income tax liability for those years, for even if the entire deductions claimed on account of these losses had been disallowed, the returns would still have shown net losses.

Collins sought a redetermination by the Board of Tax Appeals, now the Tax Court. He contended that the recovery of 1939 was in the nature of a return of capital from which he realized no gain and no income either actually or constructively, and that he had received no tax benefit from the loss deductions. In the alternative he argued that if the recovery could be called income at all it was taxable as capital gain. The Commissioner insisted that the entire recovery was taxable as ordinary gain and that it was immaterial whether the taxpayer had obtained any tax benefits from the loss deduction reported in prior years. The Tax Court sustained the taxpayer's contention that he had realized no taxable gain from the recovery.

The Court of Appeals concluded that the "tax benefit theory" applied by the Tax Court "seems to be an injection into the law of an equitable

principle, found neither in the statutes nor in the regulations." Because the Tax Court's reasoning was not embodied in any statutory precept, the court held that the Tax Court was not authorized to resort to it in determining whether the recovery should be treated as income or return of capital. It held as matter of law that the recoveries were neither return of capital nor capital gain, but were ordinary income in the year received. Questions important to tax administration were involved, conflict was said to exist, and we granted certiorari.

It is contended that the applicable statutes and regulations properly interpreted forbid the method of calculation followed by the Tax Court. If this were true, the Tax Court's decision would not be "in accordance with law" and the court would be empowered to modify or reverse it. Whether it is true is a clear-cut question of law and is for decision by the courts.

The court below thought that the Tax Court's decision "evaded or ignored" the statute of limitation, the provision of the Regulations that "expenses, liabilities, or deficit of one year cannot be used to reduce the income of a subsequent year," and the principle that recognition of a capital loss presupposes some event of "realization" which closes the transaction for good. We do not agree. The Tax Court has not attempted to revise liability for earlier years closed by the statute of limitation, nor used any expense, liability, or deficit of a prior year to reduce the income of a subsequent year. It went to prior years only to determine the nature of the recovery, whether return of capital or income. Nor has the Tax Court reopened any closed transaction; it was compelled to determine the very question whether such a recognition of loss had in fact taken place in the prior year as would necessitate calling the recovery in the taxable year income rather than return of capital.

The 1928 Act provides that "The Board in redetermining a deficiency in respect of any taxable year shall consider such facts with relation to the taxes for other taxable years as may be necessary to correctly redetermine the amount of such deficiency. . . ." The Tax Court's inquiry as to past years was authorized if "necessary correctly to redetermine" the deficiency. The Tax Court thought in this case that it was necessary; the Court of Appeals apparently thought it was not. This precipitates a question not raised by either counsel as to whether the court is empowered to revise the Tax Court's decision as "not in accordance with law" because of such a difference of opinion.

With the 1926 Revenue Act, Congress promulgated, and at all times since has maintained, a limitation on the power of courts to review Board of Tax Appeals (now the Tax Court) determinations. ". . . such courts shall have power to affirm or, if the decision of the Board is not in accordance with law, to modify or to reverse the decision of the Board . . . ." However, even a casual survey of decisions in tax

cases, now over 5,000 in number, will demonstrate that courts, including this court, have not paid the scrupulous deference to the tax laws' admonitions of finality which they have to similar provisions in statutes relating to other tribunals. After thirty years of income tax history the volume of tax litigation necessary merely for statutory interpretation would seem due to subside. That it shows no sign of diminution suggests that many decisions have no value as precedents because they determine only fact questions peculiar to particular cases. Of course frequent amendment of the statute causes continuing uncertainty and litigation, but all too often amendments are themselves made necessary by court decisions. Increase of potential tax litigation due to more taxpayers and higher rates lends new importance to observance of statutory limitations on review of tax decisions. No other branch of the law touches human activities at so many points. It can never be made simple, but we can try to avoid making it needlessly complex.

It is more difficult to maintain sharp separation of court and administrative functions in tax than in other fields. One reason is that tax cases reach circuit courts of appeals from different sources and do not always call for observance of any administrative sphere of decision. Questions which the Tax Court considers at the instance of one taxpayer may be considered by many district courts at the instance of others.

The Tucker Act authorizes district courts, sitting without jury as courts of claims, to hear suits for recovery of taxes alleged to have been "erroneously or illegally assessed or collected." District courts also entertain common law actions against collectors to recover taxes erroneously demanded and paid under protest. Trial may be by jury, but waiver of jury is authorized, and in tax cases jury frequently is waived. In such cases the findings of the court may be either special or general. The scope of review on appeal may be affected by the nature of the proceeding, the kind of findings, and whether the jury was waived under a particular statutory authorization or independently of it. The multiplicity and complexity of rules is such that often it is easier to review the whole case on the merits than to decide what part of it is reviewable and under what rule. The reports contain many cases in which the question is passed over without mention.

Another reason why courts have deferred less to the Tax Court than to other administrative tribunals is the manner in which Tax Court finality was introduced into the law.

The courts have rather strictly observed limitations on their reviewing powers where the limitation came into existence simultaneously with their duty to review administrative action in new fields of regulation. But this was not the history of the tax law. Our modern income tax experience began with the Revenue Act of 1913. The World War soon brought high rates. The law was an innovation, its constitutional

aspects were still being debated, interpretation was just beginning, and administrators were inexperienced. The Act provided no administrative review of the Commissioner's determinations. It did not alter the procedure followed under the Civil War income tax by which an aggrieved taxpayer could pay under protest and then sue the Collector to test the correctness of the tax. The courts by force of this situation entertained all manner of tax questions, and precedents rapidly established a pattern of judicial thought and action whereby the assessments of income tax were reviewed without much restraint or limitation. Only after that practice became established did administrative review make its appearance in tax matters.

Administrative machinery to give consideration to the taxpayer's contentions existed in the Bureau of Internal Revenue from about 1918 but it was subordinate to the Commissioner. In 1923, the situation was brought to the attention of Congress by the Secretary of the Treasury, who proposed creation of a Board of Tax Appeals, within the Treasury Department, whose decision was to conclude Government and taxpayer on the question of assessment and leave the taxpayer to pay the tax and then test its validity by suit against the Collector. Congress responded by creating the Board of Tax Appeals as "an independent agency in the executive branch of the Government." The Board was to give hearings and notice thereof and "make a report in writing of its findings of fact and decision in each case." But Congress dealt cautiously with finality for the Board's conclusions, going only so far as to provide that in later proceedings the findings should be "prima facie evidence of the facts therein stated." So the Board's decisions first came before the courts under a statute which left them free to go into both fact and law questions. Two years later Congress reviewed and commended the work of the new Board, increased salaries and lengthened the tenure of its members, provided for a direct appeal from the Board's decisions to the circuit courts of appeals or the Court of Appeals of the District of Columbia, and enacted the present provision limiting review to questions of law.

But this restriction upon judicial review of the Board's decisions came only after thirteen years of income tax experience had established a contrary habit. Precedents had accumulated in which courts had laid down many rules of taxation not based on statute but upon their ideas of right accounting or tax practice. It was difficult to shift to a new basis. This Court applied the limitation, but with less emphasis and less forceful resolution of borderline cases in favor of administrative finality than it has employed in reference to other administrative determinations.

That neglect of the congressional instruction is a fortuitous consequence of this evolution of the Tax Court rather than a deliberate or purposeful judicial policy is the more evident when we consider that

every reason ever advanced in support of administrative finality applies to the Tax Court.

The court is independent, and its neutrality is not clouded by prosecuting duties. Its procedures assure fair hearings. Its deliberations are evidenced by careful opinions. All guides to judgment available to judges are habitually consulted and respected. It has established a tradition of freedom from bias and pressures. It deals with a subject that is highly specialized and so complex as to be the despair of judges. It is relatively better staffed for its task than is the judiciary. Its members not infrequently bring to their task long legislative or administrative experience in their subjects. The volume of tax matters flowing through the Tax Court keeps its members abreast of changing statutes, regulations, and Bureau practices, informed as to the background of controversies and aware of the impact of their decisions on both Treasury and taxpayer. Individual cases are disposed of wholly on records publicly made, in adversary proceedings, and the court has no responsibility for previous handling. Tested by every theoretical and practical reason for administrative finality, no administrative decisions are entitled to higher credit in the courts. Consideration of uniform and expeditious tax administrations require[s] that they be given all credit to which they are entitled under the law.<sup>17</sup>

Tax Court decisions are characterized by substantial uniformity. Appeals fan out into courts of appeal of ten circuits and the District of Columbia. This diversification of appellate authority inevitably produces conflict of decision, even if review is limited to questions of law. But conflicts are multiplied by treating as questions of law what really are disputes over proper accounting. The mere number of such questions and the mass of decisions they call forth become a menace to the certainty and good administration of the law.

To achieve uniformity by resolving such conflicts in the Supreme Court is at best slow, expensive, and unsatisfactory. Students of federal taxation agree that the tax system suffers from delay in getting the final word in judicial review, from retroactivity of the decision when it is obtained, and from the lack of a roundly tax-informed viewpoint of judges.

Perhaps the chief difficulty in consistent and uniform compliance with the congressional limitation upon court review lies in the want of a certain standard for distinguishing "questions of law" from "questions of fact." This is the test Congress has directed, but its difficulties in practice are well known and have been subject of frequent comment. Its difficulty is reflected in our labeling some questions as "mixed ques-

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<sup>17</sup> This expression of the reasons for restricting the scope of review may profitably be compared with the somewhat similar exposition in Mr. Justice Brandeis' concurring opinion in *St. Joseph Stock Yards Co. v. United States of America*, 298 U. S. 38, 80 L. Ed. 1033, 56 S. Ct. 720 (1936), *supra*.



tions of law and fact" and in a great number of opinions distinguishing "ultimate facts" from evidentiary facts.

It is difficult to lay down rules as to what should or should not be reviewed in tax cases except in terms so general that their effectiveness in a particular case will depend largely upon the attitude with which the case is approached. However, all that we have said of the finality of administrative determination in other fields is applicable to determinations of the Tax Court. Its decision, of course, must have "warrant in the record" and a reasonable basis in the law. But "the judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body." *Rochester Telephone Corp. v. United States*, 307 U. S. 125, 146; *Swayne & Hoyt, Ltd. v. United States*, 300 U. S. 297, 304; *Mississippi Valley Barge Line Co. v. United States*, 292 U. S. 282, 286-7; *Gray v. Powell*, 314 U. S. 402, 412; *Helvering v. Clifford*, 309 U. S. 331, 336; *United States v. Louisville & Nashville R. Co.*, 235 U. S. 314, 320; *Wilmington Trust Co. v. Helvering*, 316 U. S. 164, 168.

Congress has invested the Tax Court with primary authority for redetermining deficiencies, which constitutes the greater part of tax litigation. This requires it to consider both law and facts. Whatever latitude exists in resolving questions such as those of proper accounting, treating a series of transactions as one for tax purposes, or treating apparently separate ones as single in their tax consequences, exists in the Tax Court and not in the regular courts; when the court cannot separate the elements of a decision so as to identify a clear-cut mistake of law, the decision of the Tax Court must stand. In view of the division of functions between the Tax Court and reviewing courts it is of course the duty of the Tax Court to distinguish with clarity between what it finds as fact and what conclusion it reaches on the law. In deciding law questions courts may properly attach weight to the decision of points of law by an administrative body having special competence to deal with the subject matter. The Tax Court is informed by experience and kept current with tax evolution and needs by the volume and variety of its work. While its decisions may not be binding precedents for courts dealing with similar problems, uniform administration would be promoted by conforming to them where possible.

The Government says that "the principal question in this case turns on the application of the settled principle that the single year is the unit of taxation." But the Tax Court was aware of this principle and in no way denied it. Whether an apparently integrated transaction shall be broken up into several separate steps and whether what apparently are several steps shall be synthetized into one whole transaction is frequently a necessary determination in deciding tax consequences. Where no statute or regulation controls, the Tax Court's selection of the course to follow is no more reviewable than any other question of

fact. Of course we are not here considering the scope of review where constitutional questions are involved. The Tax Court analyzed the basis of the litigation which produced the recovery in this case and the obvious fact that "regarding the series of transactions as a whole it is apparent that no gain was actually realized." It found that the taxpayer had realized no tax benefits from reporting the transaction in separate years. It said the question under these circumstances was whether the amount the taxpayer recovered in 1939 "constitutes taxable income, even though he realized no economic gain." It concluded that the item should be treated as a return of capital rather than as taxable income. There is no statute law to the contrary, and the administrative rulings in effect at the time tended to support the conclusion. It is true that the Board in a well considered opinion reviewed a number of court holdings, but it did so for the purpose of showing that they did not fetter its freedom to reach the decision it thought sound. With this we agree.

[The court then discussed other contentions urged by the Government.]

. . . We are not adopting any rule of tax benefits. We only hold that no statute or regulation having the force of one and no principle of law compels the Tax Court to find taxable income where as a matter of fact it found no economic gain and no use of the transaction to gain tax benefit. The error of the court below consisted of treating as a rule of law what we think is only a question of proper tax accounting.<sup>18</sup>

. . .

### Negative Orders

**Rochester Telephone Corp. v. United States, Supreme Court of the United States, 1939. 307 U. S. 125, 83 L. Ed. 1147, 59 S. Ct. 755.**

Suit in equity by the Rochester Telephone Corporation against the United States of America and the Federal Communications Commission to review an order of the Federal Communications Commission. From a decree, 23 F. Supp. 634, dismissing the bill, the Rochester Telephone Corporation appeals. . . .

MR. JUSTICE FRANKFURTER delivered the opinion of the court.

This is an appeal, under Sec. 238 of the Judicial Code as amended, 28 USC § 345, 28 USCA § 345, from a final decree by a district court of three judges, under the Urgent Deficiencies Act of October 22, 1913, 28 USC §§ 45, 47a, 28 USCA §§ 45, 47a, as extended by Sec. 402 (a) of the Federal Communications Act, 47 USC § 402 (a), 47 USCA

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<sup>18</sup> For discussion of Dobson case, see Paul, "Dobson v. Commissioner: The Strange Ways of Law and Fact," 57 Harv. L. Rev. 753 (1944). Congressional disapproval of some phases of the decision is indicated in the 1948 Revenue Act [I. R. C. 1141(a)]. See 484 C. C. H. 1731.

§ 402 (a), dismissing on the merits a bill to review an order of the Federal Communications Commission.

At the outset a challenge to the jurisdiction of the District Court confronts us. It involves those problems of administrative law which are implied by the doctrine of "negative orders." Inasmuch as this phrase is shorthand for a variety of situations, sharp heed must be given to the precise circumstances—inter alia, the statutory provisions for review, the terms of the contested order, the grounds of objection to it—which in this and other cases have invoked the doctrine.

Section 2 (b) of the Communications Act of 1934, 47 USCA § 152 (b), provides that, with certain exceptions not here material, the Communications Commission shall not have jurisdiction over any carrier "engaged in interstate or foreign communication solely through physical connection with the facilities of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with, such carrier." The appellant, Rochester Telephone Corporation (hereafter called the Rochester), is a New York corporation maintaining a system of telephone communications in and around the City of Rochester. For present purposes the Rochester is to be deemed as engaged in interstate communications solely because of physical connections with the facilities of the New York Telephone Company (hereafter called the New York).

The present controversy grew out of a ruling by the Federal Communications Commission that the Rochester owed obedience to a series of orders issued by the Commission. These orders required all telephone carriers subject to the Act to file schedules of their charges, copies of contracts with other telephone carriers, information concerning their corporate and service history, their relations with affiliates, their use of franks and passes. Copies of these orders were duly served on the Rochester. No response being had, the Telephone Division of the Communications Commission, on October 9, 1935, ordered the Rochester to show cause why it should not be required to file responses to the general orders theretofore served upon it. The Rochester answered, claiming to be outside the requirements of the Act except as to matters not here questioned.

To ascertain the facts in the contested issue, the Commission appointed a trial examiner. At hearings held by him the Rochester entered a special appearance, denying the Commission's jurisdiction and contending that the burden of proof was on the Commission to show that Rochester did not come within the exclusionary provisions of Section 2 (b) (2). After a thorough hearing and the submission of briefs, the examiner filed his report, to which the Rochester duly excepted. Upon the basis of these proceedings and of argument before it, the Commission, through its Telephone Division, sustained the findings of its

chief examiner, determined that the Rochester was under the "control" of the New York and therefore not entitled to the classification of a mere connecting carrier under Section 2 (b) (2). Accordingly, the Commission ordered the Rochester classified "as subject to all common carrier provisions of the Communications Act of 1934, and, therefore, subject to all orders of the Telephone Division." A petition for rehearing before the full Commission was denied.

The Rochester thereupon filed the present bill, alleging that the order entered by the Commission on November 18, 1936, pursuant to its Report, was contrary to undisputed facts and erroneous as a matter of law, and that the Commission's threat to enforce it put the Rochester to the hazard of irreparable injury, and praying that the District Court "make and enter its order and decree setting aside and annulling said orders of the Federal Communications Commission hereinbefore mentioned, and each and all of them, and enjoining the enforcement of said orders, except in so far as the provisions of said orders . . . have already been complied with."

The case was disposed of in the District Court on the pleadings and the record before the Commission.

Below, the Government made no objection to the District Court's jurisdiction, nor did that court raise the question *sua sponte*. It sustained the Commission's action on the merits and dismissed the bill. Here, the Government urges that under the doctrine of "negative orders" the Commission's order was not reviewable, but, in the alternative, supports the decree on the merits.

The relation of action by the Federal Communications Commission to the reviewing power of the courts is here for the first time. The jurisdictional objection raised by the Government in this case implicates other federal regulatory bodies as well, because the various statutory schemes for judicial review have either been carried over from the Urgent Deficiencies Act, pertaining to orders under the Acts to Regulate Commerce, or because different statutory provisions have by analogy been assimilated to the "negative order" doctrine. That doctrine has not had wholly plain sailing in the many cases, both here and in the lower federal courts, since it first got under way in 1912, in *Procter & Gamble Co. v. United States*, 225 U. S. 282, 32 S. Ct. 761, 56 L. Ed. 1091.

The important procedural problems with which this case is entangled therefore call for clarification.

The prior decisions involving the "negative order" doctrine fall into three categories:

- (1) Where the action sought to be reviewed may have the effect of forbidding or compelling conduct on the part of the person seeking to review it, but only if some further action is taken by the Commission. Such a situation is presented by an attempt to review a valuation made

by the Interstate Commerce Commission which has no immediate legal effect although it may be the basis of a subsequent rate order.

(2) Where the action sought to be reviewed declines to relieve the complainant from a statutory command forbidding or compelling conduct on his part. The most obvious case is a denial of permission by the Interstate Commerce Commission for a departure from the long-short haul clause.

(3) Where the action sought to be reviewed does not forbid or compel conduct on the part of the person seeking review but is attacked because it does not forbid or compel conduct by a third person. A familiar example is that of a shipper requesting the Interstate Commerce Commission for an order compelling the carrier to adopt certain rates or practices which the Commission, on the merits, declines. Another instance is where the Commission authorizes the carrier to depart from the long-short haul clause and a shipper adversely affected seeks to have the authorization set aside.

In group (1) the order sought to be reviewed does not of itself adversely affect complainant but only affects his rights adversely on the contingency of future administrative action. In view of traditional conceptions of federal judicial power, resort to the courts in these situations is either premature or wholly beyond their province. Thus, orders of the Interstate Commerce Commission setting a case for hearing despite a challenge to its jurisdiction, or rendering a tentative or final valuation under the Valuation Act, 49 USCA § 19a, although claimed to be inaccurate, or holding that a carrier is within the Railway Labor Act, 45 USCA § 151 et seq., and therefore amenable to the National Mediation Board, are not reviewable.

The governing considerations which keep such orders without the area of judicial review were thus summarized for the court by MR. JUSTICE BRANDEIS in denying reviewability of a "final valuation" under the Valuations Act: "The so-called order here complained of is one which does not command the carrier to do, or to refrain from doing, anything; which does not grant or withhold any authority, privilege, or license; which does not extend or abridge any power or facility; which does not subject the carrier to any liability, civil or criminal; which does not change the carrier's existing or future status or condition; which does not determine any right or obligation." *United States v. Los Angeles R. R.*, 273 U. S. 299, 309, 310, 47 S. Ct. 413, 414, 71 L. Ed. 651.

Plainly the denial of judicial review in these cases does not derive from a regard for the special functions of administrative agencies. Judicial abstention here is merely an application of the traditional criteria for bringing judicial action into play. Partly these have been written into Article 3 of the Constitution, USCA, by what is implied from the grant of "judicial power" to determine "Cases" and "Controversies,"

Art. 3, Sec. 2, U. S. Constitution. Partly they are an aspect of the procedural philosophy pertaining to the federal courts whereby, ever since the first Judiciary Act, Congress has been loath to authorize review of interim steps in a proceeding.

Group (2) is composed of instances of statutory regulations which place restrictions upon the free conduct of the complainant. To rid himself of these restrictions the complainant either asks the Interstate Commerce Commission to place him outside the statute, or, being concededly within it, he invokes the Commission's dispensing power. In this type of situation a complainant seeking judicial review under the Urgent Deficiencies Act of adverse action by the Commission must clear three hurdles: (a) "case" or "controversy" under Article 3; (b) the conventional requisites of equity jurisdiction; (c) the specific terms of the statute granting to the district courts jurisdiction in suits challenging "any order" of the Commission.

Where a complainant seeks the Commission's authority under the terms of a statute and the Commission's action is followed by legal consequences, as was the case in *Lehigh Valley R. R. v. United States*, 243 U. S. 412, 37 S. Ct. 397, 61 L. Ed. 819, or where the Commission's order denies an exemption from the terms of the statute, as in the *Inter-Mountain Rate Case*, 234 U. S. 476, 34 S. Ct. 986, 58 L. Ed. 1408, the road to the courts' jurisdiction seems to be clear. There is a constitutional "case" or "controversy," *Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 14 S. Ct. 1125, 38 L. Ed. 1047; the requirements of equity are satisfied if disregard of the Commission's adverse action entails threat of oppressive penalties; and the suit is within the express language of the Urgent Deficiencies Act in that it is one "to enjoin, set aside, annul" an "order of said commission." 28 USC §§ 46, 47, 28 USCA §§ 46, 47. While the penalties may be imposed by the statute for its violation and not for disobedience of the Commission's order, a favorable order would render the prohibitions of the statute inoperative. The complainant can come into court, of course, not to review action within the discretionary authority of the Commission to render an adverse rather than a favorable decision but because he urges errors of law outside the Commission's final say-so. Such an analysis emerges from a long sequence of cases under the Urgent Deficiencies Act viewed in the setting of general doctrines of federal jurisdiction. On the other hand, the result in the *Lehigh Valley* case was reached in the earlier phases of modern administrative law and did not deal with its specific jurisdictional problems in the perspective of underlying principles governing federal equitable jurisdiction. In consequence, the phrase "negative orders" gained currency as though it were descriptive of some technical doctrine of jurisdiction having peculiar relevance to judicial review of orders of the Interstate Commerce Commission and comparable regulatory bodies.

This brings us to the cases in group (3). Here review is sought of action by the Commission which affects the complainant because it does not forbid or compel conduct with reference to him by a third person. This type of situation is illustrated by *Procter & Gamble Co. v. United States*, 225 U. S. 282, 32 S. Ct. 761, 56 L. Ed. 1091. Since this case gave rise to the notion that there is a specialized jurisdictional doctrine pertaining to "negative orders," it calls for re-examination. *Procter & Gamble Co.* filed a complaint with the Interstate Commerce Commission to set aside demurrage rules that imposed charges on private cars left unloaded for over forty-eight hours on private tracks. The Commission dismissed the complaint on the ground that rules were within the carriers' authority to make conditions for the acceptance of private cars. *Procter & Gamble* then petitioned the Commerce Court to annul the Commission's action and to enjoin the carriers from enforcing the rules. The Commerce Court took jurisdiction but found the Commission's action to be within its authority. On appeal this Court held that the Commerce Court erred in taking jurisdiction and remanded the cause for dismissal.

Clearly *Procter & Gamble* was authorized under Section 13 of the Act to Regulate Commerce, 49 USCA § 13, to institute the proceedings before the Commission. Since it asserted a legal right under that Act to have the Commission apply different principles of law from those which led the Commission to dismiss the complaint, the ingredients for an adjudication—constituting a case or controversy—were present. Compare *Interstate Commerce Commission v. Brimson*, *supra*; *Interstate Commerce Commission v. Baird*, 194 U. S. 25, 38, 24 S. Ct. 563, 566, 48 L. Ed. 860. Judicial relief would be precisely the same as in the recognized instances of review by courts of Commission action: if the legal principles on which the Commission acted were not erroneous, the bill would be ordered dismissed; if the Commission was found to have proceeded on erroneous legal principles, the Commission would be ordered to proceed within the framework of its own discretionary authority on the indicated correct principles. The requisites of equity have of course to be satisfied, but by the conventional criteria. They were satisfied in the *Procter & Gamble* case, since the bill sought to avoid a multiplicity of suits. Finally, the shipper was within the express language of Congress authorizing suits "to enjoin, set aside, annul, . . . any order of the Interstate Commerce Commission." To be sure the opinion in the *Procter & Gamble* case partly yielded to the Government's main contention in that case that the jurisdictional statute only applied where the order complained of was one which was to be enforced by the Commission. More recent decisions of this court, however, have dispensed with this requisite for review.

The impelling consideration underlying the decision in the *Procter & Gamble* case did not concern technical procedure. It was part of the

process of adjusting relations between the Interstate Commerce Commission and the courts to effectuate the purposes of the Commission. This is made abundantly clear by the general atmosphere of the opinion as well as by its language, particularly when regard is had to the fact that the court's spokesman was CHIEF JUSTICE WHITE, who had such a large share in developing modern administrative law. While the Interstate Commerce Commission had been in existence since 1887, the enlargement of its powers through the Hepburn Act, in 1906, and the Mann-Elkins Act, in 1910, the establishment of similar agencies in many states following the lead of New York and Wisconsin, and widespread recognition that these specific instances marked a general movement, made increasingly manifest the place of administrative agencies in enforcing legislative policies and called for accommodation of the duties entrusted to them to our traditional judicial system. This court "ascribed" to the findings of the Commission "the strength due to the judgments of a tribunal appointed by law and informed by experience." *Illinois Central R. R. v. Interstate Commerce Commission*, 206 U. S. 411, 454, 27 S. Ct. 700, 704, 51 L. Ed. 1128. Recognition of the Commission's expertise also led this court not to bind the Commission to common law evidentiary and procedural fetters in enforcing basic procedural safeguards.

From these general considerations the court evolved two specific doctrines limiting judicial review of orders of the Interstate Commerce Commission. One is the primary jurisdiction doctrine, firmly established in *Texas & Pacific Ry. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 27 S. Ct. 350, 51 L. Ed. 553, 9 Ann. Cas. 1075. Thereby matters which call for technical knowledge pertaining to transportation must first be passed upon by the Interstate Commerce Commission before a court can be invoked. The other is the doctrine of administrative finality. Even when resort to courts can be had to review a Commission's order, the range of issues open to review is narrow. Only questions affecting constitutional power, statutory authority and the basic prerequisites of proof can be raised. If these legal tests are satisfied, the Commission's order becomes incontestable. *Interstate Commerce Commission v. Illinois Central R. R.*, 215 U. S. 452, 470, 30 S. Ct. 155, 160, 54 L. Ed. 280; *Interstate Commerce Commission v. Union Pacific R. R.*, 222 U. S. 541, 32 S. Ct. 108, 56 L. Ed. 308.

In translating these important objectives for effectuating the Congressional scheme to enlarge the independent powers of the Interstate Commerce Commission into a seemingly technical distinction between "negative" and "affirmative" orders, the opinion in *Procter & Gamble v. United States* gave authority to a doctrine which harmonizes neither with the considerations which induced it nor with the course of decisions which have purported to follow it. Subsequent cases have made it abundantly clear that "negative order" and "affirmative order" are



not appropriate terms of art. Thus, the court has had occasion to find that while an order was "negative in form" it was "affirmative in substance." "Negative" has really been an obfuscating adjective in that it implied a search for a distinction—non-action as against action—which does not involve the real considerations on which rest, as we have seen, the reviewability of Commission orders within the framework of its discretionary authority and within the general criteria of justiciability. "Negative" and "affirmative," in the context of these problems, is as unilluminating and mischief-making a distinction as the outmoded line between "nonfeasance" and "misfeasance."

The considerations of policy for which the notions of "negative" and "affirmative" orders were introduced, are completely satisfied by proper application of the combined doctrines of primary jurisdiction and administrative finality. The concept of "negative orders" has not served to clarify the relations between administrative bodies and the courts but has rather tended to obscure them. An action before the Interstate Commerce Commission is akin to an inclusive equity suit in which all relevant claims are adjusted. An order of the Commission dismissing a complaint on the merits and maintaining the status quo is an exercise of administrative function, no more and no less, than an order directing some change in status. The nature of the issues foreclosed by the Commission's action and the nature of the issues left open, so far as the reviewing power of courts is concerned, are the same. Refusal to change an existing situation may, of course, itself be a factor in the Commission's allowable exercise of discretion. In the application of relevant canons of judicial review an order of the Commission directing the adoption of a practice might raise considerations absent from a situation where the Commission merely allowed such a practice to continue. But this bears on the disposition of a case and should not control jurisdiction. The nature of judicial relief, that is the form of directions available, in situations like those presented by the Procter & Gamble and the Lehigh Valley cases, where the Commission's orders reviewed, would be no different than was that used in the Inter-Mountain Rate and the New River Co. cases. In both types of situations "a judgment rendered will be a final and indisputable basis of action as between the Commission and the defendant," *Interstate Commerce Commission v. Baird*, 194 U. S. 25, 38, 24 S. Ct. 563, 566, 48 L. Ed. 860. We conclude, therefore, that any distinction, as such, between "negative" and "affirmative" orders, as a touchstone of jurisdiction to review the Commission's orders, serves no useful purpose, and insofar as earlier decisions have been controlled by this distinction, they can no longer be guiding.

The order of the Communications Commission in this case was therefore reviewable. It was not a mere abstract declaration regarding the status of the Rochester under the Communications Act, nor was it a stage in an incomplete process of administrative adjudication. The

contested order determining the status of the Rochester necessarily and immediately carried direction of obedience to previously formulated mandatory orders addressed generally to all carriers amenable to the Commission's authority. Into this class of carriers the order under dispute covered the Rochester, and by that fact, in conjunction with the other orders, made determination of the status of the Rochester a reviewable order of the Commission.

But while the Rochester had a right to challenge the order, it cannot prevail on the merits. . . .

Decree affirmed.<sup>19</sup>

## SECTION 2. ENGLISH PRACTICE AS TO ADMINISTRATIVE FINALITY

In view of the important differences brought about by the provisions of American written constitutions and their interpretation, the English practice in regard to administrative finality is not particularly illuminating as to controversies arising in this country concerning judicial power over administrative decisions. However, it is at least interesting to note that legal systems can and do exist in other civilized countries in which administrative finality reaches a much higher degree than that attainable under our constitutional doctrine.

A few examples will illustrate some of the differences between our practice and theirs. The English cases make it abundantly clear that the judiciary will not interfere with decisions rendered by administrative bodies merely because the hearing afforded the aggrieved party falls short of judicial standards. This is true even though the administrative decision is judicial in nature. For example, in *Local Government Board v. Arlidge* [1915] A. C. 120, referred to ante, p. 150, the court refused to overturn an administrative closing order directing the closing of a tenement house, the order having been based largely upon an *ex parte* investigation and the report of an inspector. To make matters still worse the aggrieved party was not even permitted to examine the report in order that he might be enabled to refute it. The court in disposing of the controversy said that the only limitation upon the powers of the tribunal were those created by a spirit of responsibility resting upon all tribunals whose duty it is to mete out justice, i. e., a sort of "natural justice" limitation. Judicial niceties of procedure were not required and judicial review could not be invoked because of the absence of the judicial type of procedure.

<sup>19</sup> For law review comment on the Rochester case, see Moore & Adelson, "Supreme Court—1938 Term and Administrative Review," 26 Va. L. Rev. 697, 720-758 (1940); Hankin, "Fate of the Negative Order Doctrine," 29 Geo. L. Jour. 977 (1941), also 28 Ky. L. Jour. 492 (1940), and 24 Minn. L. Rev. 379 (1940).

A decision of similar purport so far as procedural methods are concerned is *Wilson v. Esquimalt & Nanaimo Ry. Co.*, [1922] 1 A. C. 202. In that case the court refused to overturn a minister's decision concerning a land grant. The effect of the decision was to deprive the Railway Company of property which it claimed as its own. The hearing which preceded the administrative decision was so conducted that the Company was not permitted to listen to the testimony of the opposing witnesses nor to cross-examine them. Procedural methods such as were approved in this and in the *Arlidge* case would clearly be deemed insufficient to satisfy constitutional limitations in this country, and would open the door to judicial reversal.

The only judicial check upon administrative authorities under the English system seems to lie in the power of the courts to prevent administrative agencies from overreaching their statutory jurisdictional limits. Presumably this includes the power to see that administrative officials act in conformity with reason, and hence abuse of discretion may be prevented. The protection afforded persons aggrieved by administrative action is obviously very much less than that available in this country. Yet one commentator has said of it:

"The writer's observations have not disclosed any outstanding abuses due to administrative finality. Even should abuse be shown, however, does it follow that the remedy lies in an appeal to the judiciary? It is suggested, rather, that the remedy lies in an improvement of the personnel of the Board. The latter course should tend to increase, the former to decrease, the efficiency of administrative actions." Tennant, "Administrative Finality," 6 Can. B. Rev. 497 (1928).

For a detailed comparison between English and American decisions as to the scope of review in particular situations, see Schwartz, "Law and the Executive in Britain" (N. Y. Univ. Press, 1949), ch. VIII.



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